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2475  
No. 11,638

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

sums. 2473-2474

LOCAL 36 OF THE INTERNATIONAL FISHER-  
MEN AND ALLIED WORKERS OF AMERICA,  
JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD  
C. KENNISON, F. R. SMITH, GEORGE  
KNOWLTON, OTIS W. SAWYER, W. B. MC-  
COMAS, HARRY A. MCKITTRICK, ARTHUR  
D. HILL, C. LLOYD MUNSON, CHARLES  
McLAUCHLAN, ROBERT M. PHELPS, BURT  
D. LACKYARD, and RAY J. MORKOWSKI,  
*Appellants,*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

BRIEF FOR APPELLANTS.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
GALLAGHER, MARGOLIS, McTERNAN & TYRE,  
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No. 11,638

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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LOCAL 36 OF THE INTERNATIONAL FISHER-  
MEN AND ALLIED WORKERS OF AMERICA,  
JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD  
C. KENNISON, F. R. SMITH, GEORGE  
KNOWLTON, OTIS W. SAWYER, W. B. MC-  
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D. HILL, C. LLOYD MUNSON, CHARLES  
McLAUCHLAN, ROBERT M. PHELPS, BURT  
D. LACKYARD, and RAY J. MORKOWSKI,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLANTS.

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### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, convicting appellants of violations of Section 1 of the Sherman Act (Act of Congress, July 2, 1890, as amended, 26 Stat. 209, 15 U.S.C. Sec. 1), said section being set forth in full at Appendix A, pages 1-2.

Jurisdiction in the District Court was claimed under Section 24 of the Judicial Code, as amended (28 U.S.C. 41).

Jurisdiction of this Court is conferred by Judicial Code, Sec. 128 (28 U.S.C. 225).

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### **STATEMENT OF THE CASE.**

#### **SUMMARY.**

It is believed that a brief summary will assist the Court in familiarizing itself with the details which will be given hereinafter.

The appellants are Local 36 of the International Fishermen & Allied Workers of America (for convenience called IFAWA) and a number of its officers.

The subject of the indictment was the collective action of the union in seeking an agreement with dealers of fresh market fish for the purpose of regulating the method by which the price of fish to the dealer was to be set.

The issues presented by the indictment reach, for the first time in adjudicated cases, into the economics of a neglected phase of our national food production. Although the government's conception of the issues was such as to treat fishermen as jobbers and middlemen, the problems presented cannot be disposed of by verbal similarities or superficial classification. The common law, as well as modern economics, long recog-

nized that original producers of food are of a different order from others in the economic life of a society, and must be distinguished from commercial dealers who receive the commodity for distribution after its production. Congress by express statutory exemptions from the Sherman Act has recognized that farmers and fishermen are charged with the most vital of all productions.

The land and the sea are the source of all of man's food. The farmer and the fisherman stand at the threshold of nature to draw sustenance from weather and geography for mankind. Of the two crafts, the fisherman is no doubt the more ancient, because until man became accustomed to a relatively permanent home, crops could not be planned or harvested. But the sea, from time immemorial, has yielded its substance to man though he were equipped only with the most primitive tools and though he expended a minimum of effort.

Some of the rudimentary nature of the craft of the fisherman remains today. Although big business has commenced to transform fishing for canneries and some other branches, in the kind of fishing which is the subject of this appeal, the sound of the gasoline engine is almost the only thing which distinguishes this fishing from what must have been done on the shores of the Mediterranean at the beginning of recorded history. If appellants have misconceived their rights under existing law, the economics of the fishing industry at the producers' stage will indeed be at the level of ancient Phoenicia.

As is true in almost every case based on the Sherman Act, the evidence is to be understood in the context of the industry as a whole. This is particularly true in the case at bar; the economics of original producers, although the subject of numerous technical studies, has not yet found its way into adjudications. For these reasons we believe the Court will require a careful analysis of the economic facts of the fishing industry in the area which is the scene of the indictment.

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#### THE FACTS.

On August 23, 1946, the Grand Jury returned an indictment against the defendants based upon alleged activities of the defendants taking place between May 1, 1946 and the date of the indictment. The indictment alleged that the Local was an organization of fishermen who own, lease, or operate a boat for the purpose of engaging on their own account in the business of catching fresh fish for the purpose of sale to dealers. Individual defendants are alleged to be such fishermen and members and officers of the Local. It was alleged that the fishermen were not employees and did not receive a salary. It is then charged that the appellants engaged in a conspiracy (1) "to fix, determine, establish, and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish", and (2) "to prevent dealers who do not agree to pay said prices from obtaining, selling or shipping any fresh fish"; and to impose a contract

containing such prices upon fish dealers by picketing and boycotting. It was further charged that as a result of the conspiracy the amount of fish coming in to the ports involved was considerably reduced and the public has been prevented from receiving a normal and usual supply of fish. (Tr. 2-20.)

On September 23, 1946, the defendants filed a motion to dismiss. (Tr. 21-25.) The motion was based upon the grounds that the indictment did not state facts sufficient to constitute an offense, and that the activities of the defendants were exempt from the provisions of the Anti-Trust Law by reason of the statute authorizing fishermen marketing agencies (48 Stat. 1213, 15 U.S.C.A. 521, 522) and by virtue of the provisions of the Clayton Act (38 Stat. 731, 15 U.S.C.A. 17). The motion was denied.

When the cause came on for trial on February 18, 1947, the defendants moved to dismiss the indictment and to challenge and strike out the entire jury panel on the ground that it had been selected in an improper manner. The District Court took evidence on these motions and on March 12, 1947 denied them. (Tr. 25-30.) Thereupon the case proceeded to trial.

At the conclusion of the government's case, the defendants moved to strike certain exhibits and testimony and also to dismiss the indictment or, in the alternative, to order a nonsuit. These motions were denied. (Tr. 30-33.) Whereupon the defense put on its case.

Before the case was submitted to the jury the defendants moved for a judgment of acquittal; this motion was likewise denied. (Tr. 1775-1777.)

On May 7, 1947 the jury returned verdicts of guilty as charged against each of the defendants, now appellants here.

On May 12, 1947, defendants moved for a judgment of acquittal or for a new trial on the following grounds: The District Court had erred in denying the defendants' prior motions to dismiss and for acquittal; the verdict was contrary to the weight of the evidence; the verdict was not supported by substantial evidence; the Court had erred in sustaining objections, in admitting testimony over objections and in its charge to the jury. This motion was heard on May 21, 1947 and denied.

Immediately thereafter the Court ordered the defendants to pay the fines indicated below and to stand committed until paid: Kennison, Knowlton, Lackyard, McComas, Munson, Phelps, Sawyer and Smith, \$10.00 each; Kibre, \$2000.00; McKittrick, \$1500.00; McLauchlan, \$2000.00; Morkowski, \$1500.00; Zafran, \$2000.00. The defendant Local 36 was ordered to pay a fine of \$3000.00.

Notice of appeal on behalf of each of the appellants was filed on May 22, 1947. (Tr. 98-100.)

Bail has been arranged for the individual appellants.

**A. The business of the appellants.**

Local 36 is affiliated with the International Fishermen and Allied Workers of America which in turn is affiliated with the Congress of Industrial Organizations. Its offices are at San Pedro, California. About 75% of all the fishermen who fish in the area from Morro Bay off Southern California to the boundary of Mexico are members of appellant local. (Tr. 2.)

Although the present case is concerned only with the business of fishing for fresh fish market dealers, members of the Local include fishermen on all small boats either that fish for cannery fish or for market fish. The Local considers itself a cooperative of workers, and in keeping with this policy only working fishermen are admitted to membership. Ownership of a share of a boat does not render the applicant ineligible; but absentee owners who invest in a vessel for profit and do not themselves actually work are not admitted. The reason for this policy was thus stated:

“With regard to the small boat fishermen, they make their entire earnings, or substantially all of their earnings, out of their share as working fishermen. Their investment in the boat, or in a boat, when they buy a vessel their investment in that boat, that is, the small boat fishermen, is primarily an investment in a boat for the purpose of using the boat for its use value.” (Kibre, Tr. 1404, 1180-1181, 1374, 1370-1375.)

In accordance with this policy an applicant is not admitted unless he has had, or until he gets, a job working on a boat. (Government Exhibit 13.)<sup>1</sup>

The scope of activities of Local 36 is indicated by the following: Of the 450 small boats which fished out of San Pedro, the Union had members on 175. Of these 175 boats, 25 were one-man boats, 105 were two-man boats, 25 were three-man boats, and twenty were four- or five-man boats. *Only 20* of the 450 small boats spent full time fishing for fresh market fish, 90 spent part time on fresh fish, and the remainder fished exclusively for the canneries. (Zafran, Tr. 1517-1520.)

About sixty per cent of the members of Local 36 do not own any interest in a boat. Only five of the fourteen individual defendants owned a boat at the time of the events in question. Four of the defendants had never owned a boat. (See Appendix B, pp. 3-5, for additional economic data.)

#### **B. Compensation of Fishermen.**

Each member of the crew, whether he fishes or cooks, receives a share of the catch for his labor. The owners of the vessel and the owners of the gear receive shares of the catch for the use of the vessel and the equipment. (DiMassa, Tr. 425-427, Falcone, Tr. 485.) Fishermen consider their share of the catch as wages. (Govt. Ex. 201.)

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<sup>1</sup>It was testified that the fishermen are manual workers deriving their income from their physical labor. (Anderson, 870-873; also Def. Ex. BB, 1423.)



The owner is obliged to spend the boat's share in maintaining the boat. The boat owner (as distinguished from the members of the crew who are not boat owners) usually spends several months each year working on the boat to keep it in condition. (Smith, Tr. 1474-1477; Knowlton, Tr. 1583; Munson, Tr. 1696; Hill, Tr. 1707.)

While the Court refused defendants' offer of proof as to fishermen's earnings (Tr. 1498-1499, 1500; 1663-1665; 1716-1720), government's witness Castagnola testified he earned \$2800 between June 6, 1946 and March 24, 1947 (Tr. 1549).

Boats are not profitable for investment. One dealer purchased several boats because this was the only way he could get swordfish; his boats have never been profitable; he used the money which he got for his share of the boat to maintain the boat, and it was not enough for that purpose; he wanted to get rid of the boats as soon as possible. (Naylor, Tr. 926-927.) Ownership of nets is likewise not profitable. (Naylor, Tr. 932-933.)

Out of season, fishermen must get other work to make a living. One dealer testified that he gave the fishermen employment for this reason, saying:

"A. Oh, yes, Heavens yes. We have the fishermen, and we either have to give them something to do or feed them, one or the other, so we hire them to work in the market, and we hire them to work on nets during the off season when there are no fish.

Q. They have to do that in order to continue to eat during that off season?

A. Well, they have to do something to eat  
\* \* \*.’’

(Naylor, Tr. 933-934.)

### C. Distribution and price.

Fishermen sell only to the wharfside dealers, who in turn resell to wholesalers, either in downtown Los Angeles or elsewhere. Wholesalers in turn frequently resell to other wholesalers. Fish pass through two to five hands before reaching the consumer. Most of the fish handled by the dealers in San Pedro is resold to other wholesalers. (Kibre, Tr. 1214-1216.)

There are only nine fish dealers in San Pedro; two in Santa Monica; not more than five in Newport Beach, a total of sixteen possible purchasers of the fishermen's catch.

But at any given time all of the dealers in any port pay the same price for fish. (See Appendix C. p. 6.) Dealers do not bid against each other. One fisherman, on being asked how the price of the fish he sold was determined, answered: "Well, I don't know how it was determined. At the time I had the boat I took whatever they gave me." (Phelps, Tr. 1606.) When a fisherman goes out to sea, he can ascertain the price of fish at that time, but he has no assurance that it will be the same when he brings the catch to port. (Kennison, Tr. 1449-1450.) There is evidence that at least one dealer (Naylor) fixed a price in advance, but even he let the fishermen take

the risk when the market was "wobbly". (Naylor, Tr. 1949.) Sometimes when the fisherman returns to port the dealers refuse to take the fish at any price. (Lackyard, Tr. 1700.)

#### **D. Fish prices.**

Generally, the price of fish is determined by the volume caught at the time. The amount of fish caught elsewhere affect the price of fish in Southern California. (DiMassa, Tr. 415, 434-435.) As a food, fish competes with meat, dairy products and other produce, and the price of fish is affected by the prices of these competitive items. (Di Massa, Tr. 435.) By reason of a change in the supply of barracuda, the price of it has been known to drop from 28¢ to 4¢ a pound in a period of a couple of days. (Hill, Tr. 1710.) Prices dropped frequently while fishermen were out at sea bringing in the catch. (Kennison, Tr. 1450.)

A government witness testified that for the past seven or eight years the price of cannery fish has been pretty well stabilized, but that the price of fresh market fish has fluctuated frequently and sharply. During this period he has seen rock cod when prices were so low that it hardly paid to bring them in. (Scofield, Tr. 708-713.) These factors perhaps explain the testimony of one witness that he spent about four months each year fishing for fresh market fish and about six months fishing for cannery fish, but that his income from the former was three times as great as his income from the latter. (McComas, Tr. 1597-1598.)

The catch of fresh market fish in Southern California is extremely low compared with other areas. The total catch in the Southern California area is less than the catch in a single port in Northern California, such as the Port of Eureka. In 1946, approximately 25 million pounds of fresh market fish were landed in Eureka; in 1938 or 1939 the catch was 5 million pounds. In Seattle in 1938 the catch was 2 million pounds; in 1946, the catch had increased to 33 million pounds. During that same period in Southern California, the catches ran much the same from year to year, with variations due to the availability of a given species of fish, but without any decided increase. During the same period in Northern California, the catch has increased about five times, and there has been a steady upward trend. (Kibre, Tr. 1229-1230.)<sup>2</sup>

**E. General conditions of the industry affecting economic strength of fishermen.**

When a fisherman puts out to sea, he does not know the price he will get for his fish or even whether he will have a buyer. (Tr. 338-339.) He does not know what or how much fish he will get. (Tr. 714-715.)

Loading facilities and trucks necessary for delivery of fish are owned by the dealer; unless the fisherman can make arrangements with a dealer to handle his catch, both in unloading and in delivery, he cannot

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<sup>2</sup>Evidence was offered that in those ports where the catch had increased, there had been price stabilizing agreements during the period of the upward trend. Such evidence was rejected by the Court. (Kibre, 1231.)

sell his fish at all. (Jones, Tr. 776; McComas, Tr. 1601-1602.)

Fishermen are subject to many state restrictions on their fishing activities. The kind of gear that a fisherman may employ for catching certain species is regulated by the Fish and Game Code. Thus, in Southern California a certain type of gear known as drag gear, commonly used to catch bottom fish, is prohibited. The same code restricts the areas in which fishermen may operate, and also puts seasonal limitations on fishing for certain species.

The uncertainties are also affected by the natural restrictions upon a fisherman's pursuit of his occupation. Fish runs are unpredictable; they vary from season to season and from year to year, and sometimes they do not run for more than ten days. During that short period the fishermen must harvest and sell to the dealer his catch of that particular species. The dealer, however, stores a large part of the fish and sells it all year around.

The fisherman is required by the State Fish and Game Code to dispose of his catch without permitting any of it to deteriorate. Violation of this rule constitutes a criminal offense and basis for revocation of the indispensable license to fish. (Kibre, Tr. 1216-1223.)

The fishermen have no facilities for storing the fish, and must dispose of it shortly after bringing it into port. (Icing facilities on a few of the boats maintain the fish while the boat is at sea, for a period

of from four to eight days. Re-icing is not possible, and when the fisherman comes in he must sell his fish immediately. Furthermore, fish must be stored at constant temperature, which can be maintained only in a refrigeration box. (Smith, Tr. 1486-1488; Phelps, Tr. 1608).)<sup>3</sup>

The foregoing facts explain what the fishermen wanted, why they wanted it and why they were willing to strike for it. The fishermen sought one thing: contractual assurance of the price for their catch *before* putting to sea. The reason is simple. Coming into port with a hatch full of fish, the fisherman is not in the position of a vendor. A vendor ordinarily has a choice of whether he shall sell or not. Not the fisherman. He has no storage facilities. He is therefore compelled by law to sell. Under the California game laws, he does not even have title. His only alternative to selling is to eat his catch himself. He is

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<sup>3</sup>Certain other testimony on this subject was rejected, although defendants offered to prove that a fisherman as a matter of practice, cannot and does not ice fish and hold it on his boat, because it is too expensive and it ties up his boat, because he doesn't have any money reserves and therefore cannot hold the fish and sell it at a time when the market is ripe, that he has to dispose of his fish in order to get other money to continue living and to be able to go out and fish again; that a fisherman does not store and ice fish with an ice company because it requires a truck and a place to unload, and he doesn't have either, and in addition there is a question of obtaining storage facilities which is a difficult one. In any event, the fisherman finally has to end up by selling his fish to the same dealer to whom he would have sold it in the first place, and the only advantage in holding fish is to the dealer who waits for the right kind of a retail market and who makes the price on the retail market by withholding this fish from sale. (Tr. 1716-1717.)

forbidden by law to dump it into the sea. He must dispose of it to dealers. He is therefore not a vendor, at least not as the term is commonly understood. His opportunity for choice exists only before he puts out to sea. If he is unwilling to hazard the sea at the prices obtainable he can stay in port. With a boat-load of fish he has no choice other than to sell at the prices offered.

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For these reasons the agreement sought by the union, although it left every price open to negotiation on 24 hours' notice, did not permit any change to be effective as to any boat which was at sea until it had disposed of the catch made in reliance on prices in effect when it put out.

The entire case hinges about the collective efforts of the appellants to get such an agreement.

#### **F. The status of the fresh fish dealer.**

The dealer is a businessman. As one dealer testified, "We are the ones who move it (fish). The fishermen can't. We are only what you would call the entrepreneur, if you would call it that way, the in-between." (Ross, Tr. 259.) Each of the dealers has storage facilities of his own and in addition has arrangements with a cold storage warehouse. (Vitalich, Tr. 289-290; 373-374; Di Massa, Tr. 396, 432-434.) The chief customers of Union Ice Company are fish dealers and brokers. These customers use most of the warehouse capacity. More fish brought in at one time merely uses up the existing storage capacity. Thus, when there are such large quantities of fish that the

dealers cannot handle it, there are no storage facilities available for the fishermen, even if they were otherwise in a position to utilize such space. (Jorgensen, Tr. 565-568.)

Fishermen are poor people. It is a general practice among dealers to lend money to fishermen and to finance them. Arrangements are made by the dealer to get a share of the catch, or in any event, the dealers have "a pretty good idea" that the fishermen-debtors will sell their fish to that dealer. (Di Massa, Tr. 382-383, 417-418.) Thus, some of the fishermen testified that they sold their entire catch to the creditor-dealer; others gave such dealers first refusal on the catch. (Souder, Tr. 810-811; McLauchlan, Tr. 1623-1624; Hill, Tr. 1713.)

The following illustrates the captive-fisherman's attitude toward his creditor:

“Q. Are you under their (the dealers’) control or direction in any way?

A. I was at the time of the strike. I owed George——

Q. I beg your pardon?

A. At the time of the strike I did owe a little money.

The Court. To whom?

The Witness. To George Naylor Bayside Fish Market.

The Court. How much?

The Witness. It was around \$100, somewhere around there.” (Souder, Tr. 804.)

Further detail on this subject is given in the Appendix, D, page 7.



### G. Local 36 as a Labor Union.

Local 36 is affiliated with the Congress of Industrial Organizations. The Constitution of the Local, Exhibit Y, states one of its objects: "to aid in building an industrial organization of all fishermen, and allied workers, and to promote the interests of the labor movement as a whole." (Article II.) The oath of allegiance contained in Article IV of the Local's constitution requires a promise of allegiance to the principles of the International Union and of the Congress of Industrial Organizations, and a promise not to discriminate against a fellow worker on account of creed, color, politics, race or nationality, a promise to assist all members of the organization to obtain the highest wages or financial return possible for their work, not to accept "a brother's job who is idle for advancing the interests of the union"; the said oath is based upon the stated premise that only by standing together can workers improve their lot and be able to enjoy the fruits of their labor. The Constitution provides for representation in the local council of the C.I.O., (Article VI, Section 12); it sets up a procedure for calling strikes and provides that while a strike is in progress, no member "shall perform any act, in the performance of which, he shall jeopardize the dignity or welfare of the Union" (Article XVI, Section 4); it sets up a steward system for the handling of grievances and the performance of other duties generally performed by labor union stewards. (Article XXI, Section 9-12.) The Constitution and By-laws are typical of those generally adopted by labor organizations.

At one meeting the following labor union business was handled: the election of delegates to the Los Angeles C.I.O. Council; taking action with respect to F.E.P.C. legislation and the Case bill. (Govt. Ex. 230.) The Local has been active in C.I.O. political activity. (Govt. Ex. 402; Kibre, Tr. 1378; Govt. Ex. 301.) In its own affairs the Local sought and obtained support of other labor organizations. (Govt. Ex. 233.) In the strike involved in this case the Local sought and obtained the aid of a United States Labor Conciliator to help reach a settlement, and asked for help from the C.I.O. and affiliated unions. (Zafran, Tr. 1545; Def. Ex. DD.)

#### **H. Local 36 as a Cooperative Marketing Agency.**

Because its members are "working producers" in the fishing industry, much of the work of the Local is the cooperative effort of the members in marketing fish. In considering arguments based on the Fishermen's Cooperative Marketing Act, the following facts are most significant: Each member of the Local has one vote and only one vote, and he receives no dividends whatsoever. (Kibre, Tr. 1182-1183.) Article II of the Local's Constitution, Exhibit Y, states as an object of the Union, the promotion of "equitable conditions of marketing of all fish caught by its members". Other objects are: finding adequate outlets for all fish caught by the members of the Local, providing proper controls of fishery resources, and the promotion of the welfare of the fishing industry as a whole.

Local 36 relied upon, and acted pursuant to, the Fishermen's Marketing Act. This is shown by the negotiations between the Local and the dealers and by the proceedings of the Local itself. (Govt. Ex. 201.)

Although the Local does not own or operate any dockage, processing plant, or icing plant, (Kibre, Tr. 1395-1396) it does much work relative to catching and marketing. Thus, when port dealers would not buy fish, the Local arranged to have the fish delivered to a dealer in Los Angeles. (McKittrick, Tr. 1759.) It concerned itself with problems of production and of disposal of particular species of fish (Govt. Ex. 301; McLauchlan, Tr. 1627-1628), getting gasoline, and cutting kelp (Govt. Ex. 402.) It developed a program for obtaining adequate mooring facilities and improving the shelter for fishing boats. (McLauchlan, Tr. 1644, Govt. Exs. 307, 220.) In all of its contracts, it dealt with the problem of obtaining correct and fair weights. It arranged for a weighmaster on a fishing barge, and when its members were shortweighted, the Local worked out a settlement for the amounts due. (Govt. Ex. 320; Kibre, Tr. 1254, 1256.) At a conference called to deal with marketing barracuda, it tried to work out a marketing program of advertising in Los Angeles and to ship excess fish to other countries. It considered, among other things, cookery demonstrations, contacting C.I.O. and Parent-Teachers Association organizations, radio broadcasts, an "Eat Fish Week", urging butchers properly to handle fish, giving away a toy balloon with fish sales, and the like. (Govt. Ex. 201.)

At the convention of the International with which Local 36 is affiliated, in January of 1946, a resolution was adopted directing all locals on the West Coast to participate in a marketing program in the Los Angeles market area. In accord with this resolution, Government agencies such as the Federal Fish and Wild Life Service, and particularly the Market Service Division of that agency, were asked to participate by the Local. Meetings were held in Seattle and in Los Angeles in which dealers were invited to and did participate. The chairman and other officers of the Western Seafood Institutes, Inc., a Los Angeles organization of fish dealers, took part in these meetings. Because of the lack of cooperation on the part of the dealers, these efforts failed. (Govt. Ex. 201; Kibre, Tr. 1309-1317; Zafran, Tr. 1549-1551; Hinkle, Tr. 1667-1678.)

Such activities have been carried on for many years. For example, in 1944, Local 36 circulated a letter to all Southern California fish dealers urging the adoption of a program to establish the basis for volume handling of fresh fish, which would mean the development of a regular fishing fleet to be available to fish all year around and to harvest the fish as it runs, to provide for additional facilities for the boats so that they could be properly taken care of in San Pedro, to develop a system of quality control from the point of delivery to the dealer to sale to the consumer, and a program of sales promotion to materially widen the market for fish. (Defs. Ex. O; Kibre, Tr. 1419-1420.)

## **I. History of collective bargaining in the west coast fishing industry.**

The object that led first to the organization of the Fishermen's union was getting a minimum price for cannery fish. In the San Pedro area, organization commenced in 1934 as the Fishermen's and Cannery Workers' International Union. Efforts at effective negotiation have met with the usual difficulties in establishing basic agreements; but the 1943 decision of Judge McCulloch, holding that collective efforts of fishermen to get minimum prices were not in violation of the anti-trust laws, first spurred effective activity in Southern California. Notwithstanding this decision, dealers from time to time refused to negotiate. As will be related in more detail, it was for the purpose of getting a decision by Federal agencies on the question whether a basic agreement between fishermen and dealers was lawful that the strike was called. (Further detail concerning the history of the organization is given at Appendix E, pp. 8-9.)

## **J. The strike.**

The 1946 strike, which is the subject of the indictment, arose out of the efforts of Local 36 to get an agreement with the fish dealers, and out of the protest by the fish dealers that such an agreement would violate the Sherman Act. The fish dealers suggested that if the fishermen would call a strike, this would prompt federal authorities to make a ruling on the question. (Zafran, Tr. 1532.) The fishermen called the strike in response to the suggestion "to expedite matters and get a decision from the government

agency in reference to the legality of signing a minimum price agreement.” (Zafran, Tr. 1531.)

### 1. The Purpose of the Strike.

The primary object of the strike, embodied in the proposed agreement, was a method by which the fishermen would be assured of a price before they put out to sea. (Ross Tr. 193.) In a negotiation with the dealers Kibre said:

“It is not a matter of signing a particular contract that we should be concerned with, but what we are interested in is trying to work out some form of agreement here which will give the fishermen some measure of security so that they will know what they are going to get when they go out to make their catches, and that we felt that such a measure of security was indispensable to the bringing about of a sound relationship of the fishermen and the dealers in this area so that we could then go ahead on a full-fledged marketing campaign.”

The immediate impetus for striking was the wish of the fishermen and the dealers to get a decision by government agency which would permit the parties to negotiate. The fishermen were willing to rely on the decision of Judge McCulloch which has been here referred to; but the dealers contended that they were under the stricture of a cease and desist order, and that the only way to clarify their position would be for the fishermen to strike so that they could get a ruling from a government agency. (Further details concerning the calling of the strike and the negotiations is given at Appendix F, pp. 10-15.)

## 2. The Proposed Agreement.

In May of 1946, Local 36 proposed a collective marketing agreement and submitted it to wharfside dealers in Southern California. The proposal (which is attached to the indictment as Exhibit A) covers two general subjects: marketing and price regulation. Concerning the former, provision is made for co-operation between dealers and fishermen. As to the price, the agreement proposed was essentially one to fix a method of price determination, rather than to fix prices. Although prices were fixed as to some fish, they were subject to renegotiation on twenty-four hours' notice, with arbitration in case of disagreement.

The agreement provides the dealers shall assist the fishermen in the marketing and distribution of fish. It establishes a food production and distribution committee to implement the agreement, and to work with government agencies in order to secure the maximum production of fish, to secure proper and efficient production, to maintain prices in accordance with national administration policies to combat inflation through stabilized prices, and to inform the public of the many ways in which fish can be appetizingly used. Dealers who sign are to be given equal and first preference in the purchase of fish.

Payments are to be made weekly. The union is to furnish fish weighers and inspectors of weighing apparatus. OPA prices are to be minimum prices even after controls are removed; where there are no OPA

prices the prices are to be set by agreement. All prices are subject to renegotiation on twenty-four hours' written notice. During that twenty-four hour period, and for all vessels out at sea at the time that the notice is given the contract price is to be effective. If prices cannot be agreed on, they are to be arbitrated.

All of the San Pedro dealers and some of the Newport Beach dealers refused to sign the agreement. (Zafran, Tr. 1570-3.)

#### K. Union activities during the strike.

From May 20, to July 1, 1946, the Union maintained pickets at dealers' places of business and at the wharf. (Cave, Tr. 131-6; Vitalich, Tr. 313-17; DiMassa, Tr. 397-400; Castagnola, Jr., Tr. 453-5.) During that period no fish was landed at San Pedro. (Ross, Tr. 159-60.) One dealer at San Pedro closed up his place during the month of June and except for one sale of fish did no business that month. (Vitalich, Tr. 317-18.) Another dealer in Newport Beach complained that although he continued to do business while his place was picketed his customers were told that he was unfair. (Naylor, Tr. 857-9.)

After the first few days of the strike all deliveries made by the dealers themselves stopped so far as the San Pedro waterfront was concerned. (DiMassa, Tr. 400.) The American Railway Express delivered some fish to San Pedro dealers; but the union maintained a picket line and, at the suggestion of an express com-



pany's representative, sent a letter to the company; as a result the express company did not pick up any fish from the San Pedro dealers. (Ross, Tr. 161-4, 171; Smith, 1484-5, 1492-3.)

The drivers of ice trucks refused to go through the picket line on the first day of picketing. The union gave permission to the drivers to cross the picket line for the purpose of delivering such ice as was needed to preserve the fish already on hand. (Smith, Tr. 1481-2, 1489.)

The union denied making any threats whatsoever. (Gasio, Tr. p. 876-92; Smith, 1485-6, 1493-5.) Local 36 notified dealers in San Diego and other places that certain Newport Beach dealers were unfair. (McLaughlin, Tr. p. 1661.)

During the strike the union issued clearance cards to designate that the holders had complied with the policy of the organization. To get a clearance card the fisherman had to stand picket duty. If a fisherman went from one point to another, his card indicated that he had complied with the policy of the organization. The union asked during this period that those who signed clearance cards sell only to "fair" dealers. (Zafran, Tr. 1552-3, 1573-5.)

One fisherman testified that he dumped a load of anchovies because the place where the anchovies would have been sold was picketed, and the anchovies spoiled before he could make arrangements for their unloading. (Jones, Tr. 776.) There was also testimony

that tons of anchovies are destroyed every year. (Lee, Tr. 790.)<sup>4</sup>

1. **Effect of Defendants' Strike Activities Upon Flow of Fish in Commerce.**

There is no evidence that the strike activity affected the movement of fish in commerce. At the beginning of the strike, dealers and the union knew that there was an unusually large amount, an oversupply, of fish in storage. (Exhibits 201, 302.) The fact is that there is about four times as much fish sent into San Pedro as is brought in by boats at San Pedro. (DiMassa, Tr. 436.)

After the first few days of the strike during which deliveries to dealers by the American Railway Express was as usual, incoming fish was delivered by that company to its depot and was picked up there by the dealers who took the fish to the wharf. In addition, the dealers took fish from their places of business by their own trucks to the express depot in San Pedro for shipping. (Ross, Tr. 168-73; DiMassa, Tr. 401-2.) After June 1st, fish destined for the San Pedro dealers was delivered by motor truck companies to the Union Ice Company where it was picked up by the dealers in their own trucks. (Ross, Tr. 172-3; DiMassa, Tr. 401-2; Jorgensen, Tr. 564-5; Kersbergen, Tr. 642-3; Underwood, Tr. 820-3; Simpson, Tr. 656-7.)

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<sup>4</sup>There was a running objection to all of the testimony concerning the methods used by the union in connection with the dispute, on the ground that the methods used were incompetent, irrelevant and immaterial and that the only question was the legality of the agreement which they sought to put into effect. (Tr. 406-13.)

During the war, all fishermen fished out of Newport instead of San Pedro. (Tr. 493-4.) During the strike, the fishermen did the same thing. (Castagnola, Tr. 445, 453; Bogdanish, Tr. 488.) Thus, for example, one government witness testified that during the entire period of the strike, he fished seven days a week. (Jones, Tr. 177.) In addition, fishing went on in San Diego as usual. There the price was set each morning and was the same throughout the day for the fish that was brought in that day. The price was set by negotiation between the union and the dealer. (Zafran, Tr. 1556-7.) Some fishermen who fished for shark, hauled their products to Los Angeles. (Sawyer, Tr. 1466.) Likewise during June, the American Railway Express continued to ship fish in and out of Los Angeles just as it has done at all other times. (Tr. 584-5.)

Despite the picket line, some boats delivered fish to dealers against whom the strike was in effect. (Naylor, Tr. 860-2.) Many boat crews went fishing without getting clearance cards; nothing was done about it by the union, except to place boats on the unfair list. The effect of this was that the union members would not give fishing information to such crews, would have nothing to do with those members, that is, they "cut them dead." (Kennison, Tr. 1452; Zafran, Tr. 1553, 1546-7; McLauchlan, Tr. 1613-17, 1638-9, 1651-8, 1680-4, 1634-5; Gov't. Ex. 328.) Such boats got fuel and other supplies without interruption. (Zafran, Tr. 1560-1.)

Early in June there was an unusual occurrence. Albacore, which ordinarily does not make an appear-

ance until July, was discovered in coastal waters. (Kibre, Tr. 1356-8; McLauchlan, Tr. 1640-1.) Albacore is the highest priced fish available for fishermen, and when it appears, fishermen drop other activities and go out for albacore. (Ross, Tr. 272.) That is what happened during the month of June. (Pizzo, Tr. 556.)

Despite the appearance of albacore, more fresh fish came into Newport Beach in June of 1946 than in any other year. (McLauchlan, Tr. 1624-5.) The Fish and Game Commission kept figures for only the last fifteen days of June and during that period there was about as much fish delivered at Newport as during any other entire month for which records were kept. (Tendick, Tr. 1035-7.)

During the month of June almost twice as much fish was frozen as in the previous month. (Tendick, Tr. 1052.) In addition, twice as much fish came in from Mexico in June as came in in July 1946. (Tendick, Tr. 1054-6.) There was no evidence whatever that the overall amount of fish in interstate commerce in the Southern California area was affected by the conduct of the defendants.

#### **L. Offers of proof.**

The Government objected to evidence offered by the defense on numerous matters. Accordingly offers of proof were made. Because they are deemed essential to a proper disposition of this appeal their substance is given here and at Appendix G, pages 16-30.

The defendants offered to prove through an economist and specialist in agricultural marketing and

economies, who had made a special study of the problems of cooperative marketing in the fresh fish field, the following:

That joint action on the part of a group of primary producers of a seasonal and perishable product to improve the prices they receive is not harmful to consumers, but rather is beneficial. A primary producer, as is the fishermen involved in this case, is the one who in effect brings the product into existence. Technically he is a small scale producer, very much in the same position as an individual farmer. The output of a large number of such producers is necessary to meet the needs of consumers in the market. While a fisherman does require a certain amount of equipment, in order to perform his work, he is more accurately described as a labor producer than as a capitalist or entrepreneur. His most important investment is the labor, that is, his time which he risks in the hope of receiving a return. Although he is not under the direct control of an employer, he generally sells to one or a small number of buyers and is much in the same position as a small farmer dealing with a cannery or canneries. To a great extent, he is under the control of the one who buys his product.

The ordinary manufacturer is not a producer in the same sense as a fisherman or farmer who brings a commodity into existence for the first time. A manufacturer processes a product. In the case of the fisherman and the farmer, nature largely does the processing and therefore the processing factors are not subject to a great deal of control.

The total volume of commodities available for sale and the time at which they are available is not subject to the control of the producer.

The fisherman, who like the farmer, is a producer of a highly perishable product, must sell immediately. Because of his economic status and because of his lack of storage and other facilities, he cannot hold on to the product for a better price. Because of these and other factors enumerated, the original producer is in an inferior economic position. The man to whom the fisherman and the farmer sell their product is an entrepreneur who risks primarily his money in the hope of making a profit. In his case, the time invested in carrying on his transactions is the minor and insignificant part of his operation. The buyer typically operates on a much larger scale than the fisherman or the farmer and generally makes purchases from a considerable number of producers. He has control in the nature of an employer in that he decides the type of product, the grade of product, the quantity to buy, and whether and when he will abstain from buying. While the fisherman is usually limited to fishing for one species of fish at any time by reason of the equipment and facilities available to him, the dealer deals in many varieties simultaneously. Thus, the dealer gets supplies of fish even when fishermen engaging in seeking certain species obtain no catch whatsoever. The buyer has the further advantage that he may and does receive supplies from distant points and is therefore not dependent on the output of any one

fisherman. For these reasons the buyer is in a much better bargaining position than is the fisherman.

For the buyer the problems created by the perishable nature of the product has been solved. He can afford storage facilities, because his volume is normally adequate to justify this investment. This, again, improves the bargaining power of the buyer.

The dealer is not a consumer. The consumer, having a choice between numerous food products with the same general qualities, is in a dominant position. Generally speaking, a decrease in price results in a more than proportionate increase in volume of purchases and an increase in price results in a more than proportionate decrease in volume of purchases by the consumer. The price to the consumer is not determined by the price which the dealer pays to the fisherman.

The fisherman once he brings fish to the place of sale has no withholding power and consequently the sale is like a forced sale. In this kind of a market, wide fluctuation in prices from season to season and even from day to day is common.

The further factor that the buyer may have supplies in storage makes him independent of any individual fisherman.

The effect of all this is that when many fishermen have a small catch or no catch at all the price is high, and as soon as the price drops to a low price, the catch is reduced because the return is insufficient.

The consumer does not gain by low prices to the producer, because the low prices to the producer are set by the supply of fish coming in at any particular time, whereas the dealer can store the food and need not sell. In fact, the weak bargaining position of the producer tends to lower prices to him, reduce the amount of fishing, and therefore, the supply of fish; the overall reduction in the supply of food tends to increase prices to the consumer.

The effect of combinations of fishermen or farmers to secure higher prices is that buyers must bid actively or possibly agree on a price in advance in order to secure ample supply; it improves the bargaining position of the producers. They still have to meet the risks of weather, lack of fish, etc. A price increase to the producers generally results in an increase in the volume of produce available to the consumer, but not in an increased price for the simple reason that the consumer is free to shop around and refuse to purchase except at prices comparable with competing commodities. The adjustment is made in the marketing margin of the dealer. They are not helpless, however, because where any adjustment they have to make is excessive, they still have the alternative of seeking supplies elsewhere.

Collective bargaining associations are common in the agricultural field. Such associations negotiate with private market operators over the price, terms of sale, and other business arrangements involved in selling the product of its members. Such a collective



bargaining association does not handle the product of its members. There are a number of such bargaining associations among primary farm producers in California. In the instance of collective bargaining associations which have actually been sponsored by the Government, there are present none of the manifestations of monopoly which are frowned on by society. Supply is not reduced but the exact opposite is accomplished.

“Collective action on the part of primary farmer producers has been encouraged and has been found socially desirable. The same type of encouragement extended to the fishermen primary producers would be likely to have the same results.”

For summaries of other offers see Appendix G, pages 16-30.

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## ARGUMENT.

### I.

**THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 9, p. 2581.)

**A. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE FISHERMEN'S MARKETING ACT, 48 STAT. 1213, 15 U.S.C. 521.**

#### 1. The Statute.

The Fishermen's Marketing law provides:

“521. Fishing industry; associations authorized; aquatic products defined; marketing agencies; requirements.

Persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

The term 'aquatic products' includes all commercial products of aquatic life in both fresh and salt water, as carried on in the several States, the District of Columbia, the several Territories of the United States, the insular possessions, or other places under the jurisdiction of the United States.

Such associations may have marketing agencies in common, and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

and in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount

greater in value than such as are handled by it for members."

## 2. Instructions given by the Court.

With respect to the Fishermen's Marketing Act, the Court instructed the jury as follows:

*"If you find as a fact that the fishermen members of defendant Local 36 are independent businessmen who are engaged in the business of catching and selling fish to dealers on and for their own account and profit, and that they sell their catch directly to buyers, then I charge you as a matter of law that a conspiracy or combination as alleged in the indictment of any such fishermen for the purpose of fixing, establishing and maintaining the price at which they shall individually sell their fish, and to prevent the buyers of fish who refuse to pay the price so agreed upon among the fishermen members of defendant Local 36 from obtaining fish from sources other than the members of defendant association constitutes a violation of the law, and that any and all individual defendants herein who you find have been members of or participated in such combination or conspiracy for the aforesaid purposes would be in violation of law as charged in the indictment. \* \* \**

The Fish Marketing Act, which has been referred to during the trial of this case, reads in its material portions as follows: (The Court then read the Fishermen's Marketing Act as set forth above.) \* \* \*

\* \* \* \* \*

As a matter of law, persons engaged in the business of catching fish for sale and profit may

act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. *When formed for such purposes, such an association may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer.*" (Emphasis ours.) (Tr. 1939-42.)

The italicized portions of the instructions are those to which defendants' objections, as far as the Fishermen's Marketing Act is concerned, were directed. The grounds thereof being: First, in order to qualify under the Fishermen's Marketing Act it is not necessary, as indicated in the instructions given, that the association engage in more than one of the activities permitted by the statute; an association may engage in collective marketing only and qualify under the Fishermen's Marketing Act. Second, it is not necessary, as indicated in the instructions, that an association in order to qualify under the Act must act either as sales agents for its members or sell on their behalf. It is sufficient if the association acts as the collective bargaining agent of its members.

See Appendix H, pages 31-32, for specific objections raised by defendants.<sup>1</sup>

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<sup>1</sup>The trial Court ruled that the argument presented might be considered as objections without being specifically set forth in objection form. (Tr. 1868.)

### 3. The instructions refused.

See Appendix I, pages 33-34, for the instructions refused on this subject.

The defendants objected to the refusal to give these and other instructions proposed by the defendants on the grounds that each of the instructions constituted correct statements of law. (Tr. 1919.) The proposed instructions clearly state: First, that an association may qualify under the Fishermen's Marketing Act by engaging in collective marketing only; and second, that an association engaging in collective bargaining on behalf of its members is collectively marketing within the meaning of the Act.

### 4. The applicability of the Fishermen's Marketing Act under the evidence presented.

The Fishermen's Marketing Act does not exempt fishermen from the provisions of the Sherman Anti-Trust law; however, it does exempt *certain activities* of fishermen. These activities include the association of fishermen together for the purpose of marketing fish, and such marketing necessarily involves price fixing because marketing without fixing of a price is obviously impossible.

The defendants herein are "persons engaged in the fishing industry, as fishermen \* \* \*", acting together in an association as permitted by the law. The law requires no particular form of association; it may be "corporate or otherwise, with or without capital stock."

A consideration of the legislative history of the Fishermen's Marketing Act is relevant to a determination of its applicability herein. When the Act was adopted in 1934, the House Committee reporting on the bill said:

“The purpose of this bill is to provide for the fishing industry co-operative associations such as are provided for farmers by the Capper-Volstead Act.” (1934 House Report No. 1504.)

The report refers to the serious situation in the fishing industry analogous to that in the agricultural situation. It points out that the industry must compete with foreign subsidized fishing industries. Then it goes on to quote the testimony of R. H. Fiedler, Chief of Division of Fishery Industries, U. S. Bureau of Fisheries as follows:

“The fishing industry of the country like that of farming is sorely depressed. It is operating in a most disorganized fashion and as a result of this there exists an unstable price level and customary marketing channels are ineffective in moving production. The fishermen are receiving low returns and consumers are paying relatively high prices for fishery products.

\* \* \* \* \*

“As a corollary to this disorganized situation, and because credit has dried up, during the emergency, we have witnessed the industry indulging in destructive price cutting and other detrimental practices which have reflected largely on the fishermen, resulting in lowering income to the point where their very livelihood is in jeopardy.

Thus the evils which the administration is trying to correct are particularly apparent in the fishing industry, namely, the volume of the products of the industry in interstate and foreign commerce has been diminished; the capacity of production units has been decreased; *the necessity for organization among trade groups is everywhere apparent* (committee's emph.), and, because of destructive price cutting, the purchasing power of fishermen and processors has been reduced; thousands of earners have been thrown out of regular employment, and one of our great natural resources is being exploited unwisely \* \* \*."

Finally, the report says:

"Our fishermen are burdened with debts and mortgages. They engage in an industry which involves hardships and dangers which do not attach to any other industry. They are just as badly in need of help as the farmers. The fishermen are really the forgotten men in this country, the term certainly applies to fishermen."

Despite the refusal of the Court to permit proof with respect to many of the problems of the fishermen, the record here clearly reveals a fishing industry operating in a most disorganized fashion with unstable price levels, the fishermen receiving low returns and the consumer paying relatively high prices, and with destructive price-cutting, reflecting primarily on the fishermen and resulting in such low incomes that the very livelihood of the fishermen is in jeopardy. It is precisely these conditions at which the Fishermen's Marketing Act was directed, and which the

defendants in this case sought to overcome by organizing themselves into an association and engaging in the activities for which they were prosecuted and convicted.

Inasmuch as the Fishermen's Marketing Act is based upon the Capper-Volstead Act and is intended to accomplish for fishermen the same general objectives as the Capper-Volstead Act was designed to achieve for farmers, reference to the debate on the Capper-Volstead Act is helpful in the interpretation of the Fishermen's Marketing Act. In that debate, Senator Walsh stated that the purpose of the act is to permit the fixing of prices by a combination "unless the result of the combination is to unduly enhance the price of the product or create a monopoly." (Congressional Record, Senate, 1922, pages 2219-20). Here, the Senator referred to that portion of the Capper-Volstead Act which was in substance adopted in the Fishermen's Marketing Act, as 38 Stat. 1214, 15 U.S.C. 522, which section provides as follows:

"If the Secretary of Commerce shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any aquatic product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made



directing it to cease and desist from monopolization or restraint of trade.”

The section then sets up procedure for the enforcement of the stated policy.

It thus appears that the precise purpose of both the Capper-Volstead Act and the Fishermen’s Marketing Act was to permit combinations which would control prices with the proviso that if prices were unduly enhanced by reason of such combination, the situation could be remedied by the procedure established by law. In the present case, no evidence was offered to establish that the prices obtained or requested by the defendants unduly enhanced the price of fish. As a matter of fact, offers of the defendants to prove the contrary were rejected.

In the case of *Columbia River Packers Assn. v. Hinton*, 34 Fed. Supp. 970, the plaintiff sought to enjoin the enforcement of a contract between itself and a fisherman’s union, which contract imposed on all packers and canners parties to the contract the obligation not to buy fish from anyone not a member of the union. It was contended by the union that no injunction could be issued because a labor dispute was involved within the meaning of the Norris-La Guardia Act. This contention was overruled by the District Court and an injunction was issued. The Circuit Court reversed the District Court, holding that the Norris-La Guardia Act did apply, and then the Supreme Court in turn reversed the Circuit Court and affirmed the District Court holding the Norris-La Guardia Act

inapplicable. These cases will be discussed in greater detail under other sections of the brief. At this point, however, it is necessary to consider this case insofar as it applies to the Fishermen's Marketing Act. It should be noted first of all that the plaintiff in that case offered to negotiate with the defendants in accordance with past practice for a price to be paid on the season's catch, but refused to sign a contract containing the exclusive buying clause, and then went into Court asking for an injunction restraining the defendant from interfering with purchases of fish by plaintiff from any source. The only question involved was whether or not defendant union had a right to negotiate a contract with the plaintiff which would require it to purchase fish only from defendant union's members. The District Court did go on to point out that the union in that case was more properly classified as a cooperative marketing association than as a labor union, saying in this regard:

“ ‘Terms or conditions of employment’ within the meaning of the Act are not, in my opinion, involved in this controversy. Plaintiff refers to defendants as ‘independent contractors’, but defendant union has more aptly described itself in claiming the benefits of the Fishermen's Collective Marketing Act. It is truly a cooperative marketing association, and we look to the law of cooperative marketing rather than to labor law in the determination of the legality of defendants' acts.

“Defendant's members are producers, just as cattlemen, grain growers, poultry raisers and

orchardists are producers. Could it be maintained that a cooperative association of any of the types of producers named, having substantial control of production in their given field, could require of all buyers that they agree not to buy from any other producers, and could forbid and prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative?" (p. 974.)

After the final decision in the *Hinton* case, Judge McCulloch, the trial judge in the *Hinton* case, had presented to him, in a prosecution by the Anti-Trust Division, the question of the legality of a minimum price agreement.

In an unreported opinion in *United States v. Columbia River Fishermen's Protective Assn.*, No. C-16087 in the District Court of the United States for the District of Oregon, the Court said:

"This case turns on the narrow question whether agreement on an opening minimum price to be paid for fish becomes unlawful when negotiated by the Fishermen's Union, which I will treat as a cooperative, with the packers as a group, rather than by negotiation with the packers individually. While *United States v. Socony-Vacuum*, 310 U. S. 150, would seem to require such holding as to the ordinary commercial transaction, I feel that the recognition given by modern federal statutes and decisions to the special and peculiar marketing problems of producers, including commercial fishermen, justifies me in holding that the practice of group bargaining,

which has been so satisfactory on the Columbia River to fishermen as well as canners, is not subject to the criminal penalties of the Anti-Trust Act.”

It should be noted that this is the only case in which the legality of minimum price agreements by fishermen has been tested. It is significant that in this case, the very District Court Judge who held that a fishermen’s union could not sign a closed shop agreement, because such action constituted a violation of the anti-trust laws, and the Norris-La Guardia Act did not apply, also held that the law which was applicable was the Fishermen’s Marketing Act and that under this law, a fishermen’s union could properly negotiate an opening minimum price agreement.

The applicability of the act is further indicated by the various marketing activities engaged in by Local 36, as set forth in the statement of facts herein.

The only decided cases relating to minimum price agreements by fishermen hold that the Act is applicable, the legislative history of the Fishermen’s Marketing Act and of its predecessor the Capper-Volstead Act indicate that the purpose of the Act is precisely to permit associations to establish minimum prices, and finally, the evidence in this case establishes that the defendant Local 36 and its members carried on the functions of a producers’ marketing association.

For the foregoing reasons the defendants were entitled to have the jury instructed with respect to the

Fishermen's Marketing Act and any failure to correctly instruct with respect to such Act constitutes prejudicial error.

5. **An association may qualify under the Fishermen's Marketing Act by engaging in only one of the permitted activities set forth therein. That is, by engaging in marketing alone.**

The Fishermen's Marketing Act provides that an association as there defined may engage "in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce." This language is permissive. Nowhere in the Act is there any indication that in order to engage in any one of the permitted activities, the fishermen must engage in more than one or in all of them. To hold otherwise would be to require that in order to qualify under the Act, an association must engage in processing, as well as marketing, etc. Even the Government has not made this extreme contention.

The Capper-Volstead Act allows associations of farmers to engage in "collectively processing, preparing for market, handling and marketing in interstate and foreign commerce." The Court can certainly take judicial notice of the fact that there are many farmer cooperatives which do not engage in processing. The Capper-Volstead Act has never been construed to require that an association desiring to take advantage of its provisions engage in all of the approved activities. Thus, in the argument in the Senate on the Capper-Volstead Act, Senator Walsh of Montana said: "The Senator from Washington will

observe that under the provisions of both bills, the organization authorized must be an organization of the producers themselves of the products of the farm. They may engage in marketing that product or they may engage in processing it for the purpose of putting it upon the market, but the proposed legislation would exclude a combination of producers of condensed milk who do not themselves produce it."

Because the instructions given by the Court below indicated to the jury that for the defendant association to bring itself within the terms of the Fishermen's Marketing Act, it was necessary that it engage in several or all of the activities permitted by that Act, and because the Court refused to give instructions to the effect that an association engaging only in collective marketing might be entitled to the protection of the Act, the Court committed prejudicial error.

**6. An association may qualify under the Fishermen's Marketing Act by functioning merely as a bargaining agency.**

There is nothing in the language of the Act which indicates that there is limitation upon the forms of collective marketing which are proposed under the act. Is an association of fishermen, which engages in bargaining collectively for prices and terms and conditions under which its members shall market their fish a collective marketing agency? The term "collective marketing" is, of course, suggestive of collective bargaining. The purpose of collective marketing and collective bargaining is the same. It is to per-

mit individuals by combination to increase their economic strength and thereby to have some voice in determining the price for which either their product or their services are sold.

The House Report on the Fishermen's Marketing bill contains a quotation from the testimony of Mr. R. Bruce Etheridge of Department of Conservation and Development of North Carolina, who said: "I would not try to decide which one, but some form of marketing is the salvation of the fishing industry in my opinion." (1934 House Report No. 1504.) That what was involved here was some form of marketing is clear. It was a form of marketing achieved through collective agreement.

The debate on the Capper-Volstead Act, predecessor of the Fishermen's Marketing Act is also enlightening. During the course of that debate, Senator Calders said:

*"They (farmers) are only asking that by affirmative action Congress recognize the principle of collective bargaining.*

*Farmers have the natural and inherent right to approach their customers through agencies of their own creation. This right should be clearly and positively recognized by Congress. If the Sherman and Clayton Acts had been generally interpreted as their authors intended they should be, there would be no necessity for the enactment of the bill which we are now considering. The right of farmers to collectively market their products would generally have been conceded."* (1922 Senate Debate, page 2217.)

Throughout those debates there appears the recognition that the principle of collective bargaining and collective marketing are one and the same, and that it was the intent of Congress to permit farmers to collectively bargain for the sale of their product. Obviously the same intent was carried over to the Fishermen's Marketing Act.

During the course of the same debate, Senator Cummins pointed out that combinations of farmers may legally be formed for any one of three general purposes. They are: to lessen the cost of production, to lessen the cost of marketing, or third, to increase the market price of the commodity. (See Appendix J, p. 35, for Senator Cummins' statement.)

Thus, it is recognized that a combination specifically for the separate and distinct purpose of increasing prices is a proper form of association for farmers under the Capper-Volstead Act and is therefore a proper form for fishermen under the Fishermen's Marketing Act.

The fact that the form of collective marketing which has been found to be most appropriate for fishermen is the collective bargaining form of collective marketing was recognized by Judge McCulloch in the case of *U. S. v. Columbia River Fishermen's Protective Union, supra*, when he held "that the practice of group bargaining, which has been so satisfactory on the Columbia River to fishermen, as well as canners" was protected by the Fishermen's Marketing Act.



The Department of Commerce, which was charged with the enforcement of the Fishermen's Marketing Act,<sup>1</sup> has recognized these facts in a bulletin entitled "Organizing and Incorporating Fishery Co-operative Marketing Associations" Fisheries Circular No. 22, issued by the Bureau of Fisheries of that department. In that bulletin at page 7, there are listed a number of "functions which a fishery co-operative may perform." One of these is: "Elect officers or committees for the purpose of bargaining for the sale of fishery products of producers to manufacturers, processors, wholesalers, or retailers in the event that group or association does not contemplate operating a merchandising, processing, or packing business." Thus, the Department of Commerce recognizes that it is appropriate under the Fishermen's Marketing Act for an association to act as the bargaining agent of its members.

The argument that a collective bargaining association cannot qualify under the Fishermen's Marketing Act stands logic on its head. The Sherman Anti-Trust Law was never intended to apply to working producers. The Fishermen's Marketing Act not only reaffirms this original intent but permits vertical combinations of producers which extend into the field of business, which extension might in the absence of the Fishermen's Marketing law constitute a violation of the Sherman Anti-Trust Law.

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<sup>1</sup>The jurisdiction over this field has since been transferred to the Department of Interior.

Hulbert, at page 227 of his book, advanced the theory that defendants have consistently maintained when he says:

“In view of the interpretation placed upon the antitrust statutes by the Supreme Court of the United States in several cases, it is arguable that the Capper-Volstead Act was not, strictly speaking, required for the purpose of giving authority to farmers to form associations, but that the organization of cooperative associations was permissible under the antitrust statutes.”

Yet, here, the effect of the instructions of the Court was to inform the jury that unless the fishermen actually organized as a group of businessmen they were not entitled to the rights of working producers.

Under the Sherman Anti-Trust Act, the form of organization is not decisive. Whether or not there has been an unreasonable restraint upon trade is the question presented. *Appalachian Coals, Inc. v. U. S.*, 228 U. S. 344, 77 L. Ed. 825. So under the Fishermen's Marketing Act it isn't the form of organization or the precise manner in which it acts which is controlling, but rather the substance of what it does and its effect upon commerce. Thus, if the purpose of the Act is to permit fishermen to combine for the purpose of fixing prices then whether they use an association which bargains collectively for that purpose or which directly sells the product becomes immaterial. As the Court stated in the *Appalachian Coal* case (pp. 376, 377):

*“We agree that there is no ground for holding defendants’ plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that in order to comply with the law those engaged in industry should be driven to unify their properties and businesses in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. If the mere size of a single, embracing entity is not enough to bring a combination in corporate form within the statutory inhibition, the mere number and extent of the production of those engaged in a cooperative endeavor to remedy evils which may exist in an industry, and to improve competitive conditions, should not be regarded as producing illegality. The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate enterprise and the other is not—makes but an artificial distinction. The Anti-Trust Act aims at substance. Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than the formation of a huge corporation bringing various independent units into one ownership. Either may be prompted by business exigencies and the statute gives to neither a special privilege. The question in either case is whether there is an unreasonable restraint of*

trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form, and, if there is not, it is not to be condemned because of the absence of corporate integration. As we stated at the outset, the question under the Act is not simply whether the parties have restrained competition between themselves but as to the nature and effect of that restraint. *Board of Trade v. United States*, 246 U. S. 231, 238, 62 L. Ed. 683, 687, 38 S. Ct. 242, Ann. Cas. 1918D, 1207, supra; *United States v. Terminal R. Asso.*, 224 U. S. 383, 56 L. Ed. 810, 32 S. Ct. 507; *National Asso. of Window Glass Mfrs. v. United States*, 263 U. S. 403, 412, 68 L. Ed. 358, 361, 44 S. Ct. 148, supra; *Standard Oil Co. v. United States*, 283 U. S. 163, 169, 179, 75 L. Ed. 926, 945, 951, 51 S. Ct. 421."

Here, too, it is not necessary for fishermen to combine for the purpose of selling their products through a single agency if they can accomplish their objectives—legitimate objectives under the law—through the less drastic measure of forming an association which is a collective bargaining agency. The fact that in those instances where the less drastic measures are not sufficient, the law permits the more extreme method of the formation of more integrated types of combinations does not render illegal the looser form of organization.

In the case of *Johnson v. Georgia-Carolina Retail Milk Producers Association*, 182 Ga. 659, 186 S. E. 824, the defendant association was organized under the Agricultural Cooperative Marketing Act of the

State of Georgia. This association entered into individual contracts with its members whereby the association set a scale of minimum prices for the retail and wholesale marketing of milk in the Augusta markets and required each member of the association to market his milk in the Augusta markets for no less than the minimum price fixed by the association. The contract was held to be valid.

Cf. *Spark County Milk Producers Association v. Tabering*, 129 Ohio State 159, 194 N. E. 16, 98 A.L.R. 1593.

In "The Law of Cooperative Marketing" (1937) by Frank Evans and E. A. Stokdyk, former president of the Berkeley Bank for Co-operatives, Oakland, California, the existence of collective bargaining marketing associations in various fields is recognized:

"The so-called 'bargaining' associations, that is, those which do not handle the products of members but merely bargain with distributors and processors, require few if any fixed assets. Examples of these are milk bargaining associations and sugar-beet growers' associations." (p. 163.)

In the hearings conducted by the Temporary National Economic Committee of the United States Senate on Investigation of Concentration of Economic Power, a statement was introduced by Dr. Hough, chief of the division of Marketing and Transportation Research of the Bureau of Agricultural Economics, recognizing that the purpose of col-

lective marketing is to equalize the bargaining power between producers and distributors:

“We believe that cooperative marketing ought to become a more important factor in agricultural marketing than it has heretofore been and that it ought to be encouraged in certain new forms and new fields. If farmers are to be fully protected in dealing with large corporate processors and distributors, they will need co-operatives at the country end able to bargain with such distributors on an equal basis.”  
(T.N.E.C. Reports, page 453, February 25, 1941.)

Defendant association was entitled under the Fishermen's Marketing Act to limit its activities to that form of collective marketing which consisted of bargaining for the prices and for the marketing conditions under which its members will directly sell their products to the dealers. The instructions contrary to this and the refusal to give instruction stating this principle it is submitted constitute prejudicial reversible error.

## 7. Summary.

The purpose of the Fishermen's Marketing Act was to extend to fishermen the provisions of the Capper-Volstead Act as applied to farmers. These Acts have as their objective the clear and unequivocal establishment of the right of fishermen and of farmers to form associations for the purposes of engaging in collective bargaining and, if they so choose, certain other activities, such as collective processing. It was the intent of Congress to remove any doubt

that fishermen and farmers had the right to organize for the purpose of equalizing their bargaining power with that of the distributors. The law was deliberately general in its terms, because it was intended to permit any form of association and of marketing which the farmers or fishermen thought would best effectuate these objectives. The Court erred in its instructions on these points.

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**B. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE CLAYTON ACT, SECTION 6, 38 STAT. 731, 15 U.S.C, SECTION 17.**

**1. The statute.**

“Antitrust laws not applicable to labor organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” § 6, 38 Stat. 731, 15 USC, § 17.

2. **Error was committed by the Court in the instructions which it gave with relation to the Clayton Act.**

See Appendix K, pages 36-38, for instructions given.

The defendants objected to these instructions on the ground that the instructions incorrectly stated that Section 6 of the Clayton Act is applicable only if defendants are employees of the fish dealers and, as such employees, are members of a labor union engaged in a labor dispute with the dealers; that a correct statement of the law turns not upon the existence of a labor dispute or upon the presence of a technical employer-employee relationship, but rather upon whether the defendants were engaged in selling their labor or the immediate products thereof, in which event the law does apply.

For defendants' objections as stated at the trial, see Appendix L, pages 39-41.

3. **The Court erred in refusing to give instructions proposed by defendants.**

See Appendix M, pages 42-48, for instructions refused.

4. **The applicability of Section 6 of the Clayton Act under the evidence presented.**

The facts showing that the defendants in this case are original working producers,—that is, working fishermen who sell their labor or the immediate products of their labor—have for the most part been adequately set forth in the statement of facts and in the portion of the argument above relating to the applicability of the Fishermen's Marketing Act. Certain additional matters merit consideration at this point.



Under the law of the State of California, a fisherman obtains either no property right or at best a very limited and peculiar type of property right in the fish which he catches.

*People v. Stafford Packing Co.*, 193 Cal. 719;  
*People v. Huvden*, 215 Cal. 54.

It has been held that the State retains its property interest in that fish even after the fish has been caught and has been sold to a processor. In the case of *People v. Monterey Fish Products Co.*, 195 Cal. 563, the trial Court held that an illegal use of fish by a processor in violation of the provisions of the Fish and Game Code did not cause damage to the State. In reversing the judgment of the trial Court, the Supreme Court of the State said:

“Such fish can become the subject of private ownership only in such qualified way, to such limited extent, and subject to such conditions and limitations as the state through its legislature may see fit to provide and impose (citing cases). ‘It is, therefore, evident that what the people of the state own they can alienate on such terms as they choose to impose, and that this power of regulation continues so long as such fish or game are the subject of trade or transfer.’ ”

The Court then cites certain sections of the Fish and Game Code, dealing with the manner in which fish may lawfully be taken from the sea. Then the Court goes on:

“It follows that if the fish were taken in violation of law the fisherman who caught them acquired no title thereto, and even if they were

taken lawfully the sale thereof to defendant for use in its reduction plant would convey no title thereto, and the title would still remain in the state. The use of fish which was admittedly made by the defendant herein was not merely a violation of prohibitory provisions of a statute, but was also a wrong committed against the property right of the plaintiff. It was such an obstruction to the free use of property as to interfere with the comfortable enjoyment thereof by the people of the state of California and as such constituted a nuisance. (Citing cases.) Under these circumstances it cannot be said that such use of fish by the defendant did not or will not cause any loss or damage to the plaintiff and this finding is, therefore, contrary to the evidence."

When a fisherman acquires a catch of fish, he obtains at best a qualified and very limited type of ownership in that fish. His harvest of fish never really becomes his property. He collects it subject to terms and conditions which the State imposes, and he can only deliver it upon those terms and conditions and to those persons to whom the State allows him to deliver. So limited is the control of the fisherman in his catch that the reality of the situation is that the fisherman is doing nothing more than rendering services in harvesting the fish and in delivering it to the dealers.

When a fisherman bargains for the price of fish he is directly determining the wage he will receive. He is setting, in effect, the piece-rate basis for work performed. It so happens that in this case the piece-

rate basis is determined by the price for which the fish is sold to the wholesaler and, therefore, the fisherman can set and determine his wages only by setting and determining the price. If that price goes up or down, his wages automatically go up or down. This is true both of the boatowner who furnishes the boat, the net and other instruments necessary to effectuate the catch, and the other working fishermen who have no investment in the necessary tools of the trade. If the working fisherman is deprived of the right to combine for the purpose of setting the price of the fish which he catches and delivers to the dealers, it necessarily follows that he is being deprived of the right to combine for the purpose of determining his wages, that is, for the purpose of determining the return for his expenditure of labor.

5. **Section 6 of the Clayton Act relates to all human labor and to all working original producers including the defendants herein regardless of the existence of a technical employer-employee relationship.**

The Norris-LaGuardia Act is applicable to labor disputes and labor disputes are defined therein as disputes either involving or affecting an employer-employee relationship. Therefore, in determining whether or not the Norris-LaGuardia Act applies to any given situation, the existence of an employer-employee relationship within the meaning of that Act may be of paramount importance.

The Clayton Act, on the other hand, provides that the labor of a human being is not a commodity or article of commerce, and nowhere is there any indi-

cation that this concept is limited to situations in which labor of a human being is expended in the course of an employer-employee relationship. The fact that the second sentence of Section 6 of the Clayton Act refers to agricultural or horticultural organizations in which obviously no employer-employee relationship exists is further evidence that Section 6 of the Clayton Act, as distinguished from the Norris-LaGuardia Act, deals with situations in which human labor is involved, regardless of whether or not there also exists a technical employer-employee relationship. This is confirmed by the legislative history with respect to the Clayton Act.

The Senate committee in reporting the Clayton Act to the floor said:

“The only organizations which should be excluded from the operation of the anti-trust laws are those where *labor is the basis or one of the chief factors in the organizations*, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The committee rests this distinction upon the broad ground that labor is not, and ought not to be regarded as a commodity, within the purview of anti-trust laws.” (Emphasis supplied. Sen. Rep. No. 698, 63rd Cong., 2d Session (1914) 46.)

When the above is compared with the definitions contained in the Norris-LaGuardia Act it becomes obvious that the type of organization exempted by Section 6 of the Clayton Act is much broader than that to which the Norris-LaGuardia Act is intended to apply.

The first sentence of Section 6 of the Clayton Act exempting the labor of a human being from the definition of a commodity is known as the Cummins Amendment to the Clayton Act. The history of this amendment is thoroughly discussed in an article by Louis L. Boudin, 29 Virginia Law Review, 437. That article quotes copiously from the Congressional debates at the time that the Cummins amendment was introduced, and established that the author of the amendment was dealing with basic economic relationships and concepts, specifically with the distinction between those situations in which an individual is in business for a profit and those in which he is actually selling his labor or the immediate product thereof.

At page 428 of Boudin's article he states that the position of Senator Borah was also that "labor is not an article of commerce; and, in any event, working-men do not trade in *other people's* labor like traders in commodities. They are *producers* and not *traders*. The anti-trust laws concededly deal with monopolies of trade, not of *production*."

What Congress had in mind was perhaps most forcefully expressed by Representative Quinn, who said at 51 Cong. Rec. 9546:

"The only way on earth to keep the eagle eye of the Federal courts off the farmer's union and the labor unions is to make this anti-trust law so plain that they are not included in its scope that any child in the United States can understand it.

If there is the slightest ambiguity in the language, you will hear of some federal judge in 'Possum Hollow' announcing a decision that the

farmer's union is a trust in restraint of trade and that the individual members are subject to indictment if by concert of action they hold their cotton or other farm products for a higher price."

Finally, with respect to the legislative history of Section 6, the real distinction between a commodity and the labor of a human being was well stated by Congressman Buchanan, one of the leaders of the House, who said during the debate on the Clayton Act:

"The fact of the matter is that under the perversion rather than the interpretation of the Sherman anti-trust law by the Federal courts, that which is held to be law is founded upon neither justice nor common sense. The Federal courts have fallen into that error which places voluntary organizations of working people, organized not for profit but for humanitarian purposes, in the same category with greedy trusts, corporations, and monopolies which control the product of labor and which speculate in the necessities of the masses of the people. It is equal to placing human beings in the same scale with a ton of coal, a barrel of flour, or a bolt of cloth."

As has been set forth in the statement of facts, some of the defendants in this case have never owned an interest in a boat, and have simply worked on boats, receiving as their compensation a share of the price received for the catch. These men have no investment even in the simplest kind of tools. Can it be doubted that the share of the price which they receive is in its entirety a return for the expenditure

of their labor in the catching of the fish? Those defendants who at one time or another have owned an interest in a boat and its gear likewise received a share of the price for the catch in compensation for the labor expended by them in catching the fish, the same share, incidentally, as is received by the working fishermen who have no interest whatsoever in the boat. Does the fact that a man owns an interest in a boat, utilized for catching the fish, convert the compensation, which he receives for his labor, from a return paid for human labor to a profit paid upon an investment? With respect to both the boatowners and non-boatowners the question may well be asked, does the fact that the payment received for the fish is called "price" and instead of "wages" convert it from payment for expenditure of human labor to a return upon capital? Only by a most absurd construction of the law and of the facts can it be argued that the share received by the owners and by the non-owners for their work in catching the fish is not a return upon expenditure of human labor.

True, the boatowner receives an extra share in payment for the use of the boat and of the equipment furnished by him. The record shows, however, that the boat is not utilized as a means of investment for profit, but merely as the tools of the trade for fishing. It is not profitable, and the owner at best receives only the extra compensation for his labor in maintaining the boat, the rate of compensation in this connection often being less than the rate of compensation paid for the catching of fish.

The fact that the Fishermen's Marketing Act is merely an extension of the Capper-Volstead Act to fishermen has previously been noted. Both acts cover working producers who sell the products which are primarily the result of their labor, rather than constituting a return upon capital investment. That *non-stock* organizations of this kind are also exempted from the anti-trust act by Section 6 of the Clayton Act (provided that they do not combine vertically with middlemen) is established by the case of *United States v. Borden*, 308 U. S. 188, 84 L. Ed. 181, wherein the Court said:

“Section 6 of the Clayton Act, enacted in 1914, had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the anti-trust laws should not be construed to forbid members of such organizations ‘from lawfully carrying out the legitimate objects thereof.’ They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922, was made applicable as well to cooperatives having capital stock.”

The concept that services, such as those being rendered by the fishermen defendants in this case, are not within the purview of the Anti-Trust Law was conceived long before the adoption of the Clayton Act. Under the terms of the original act, it was held that services are not covered by that Act. *Hopkins v. U. S.*, 171 U. S. 578, 43 L. Ed. 290; *Anderson v. U. S.*, 171 U. S. 604, 43 L. Ed. 300.



In the Court below the prosecution relied heavily upon the case of *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, 86 L. Ed. 750, which case is discussed in considerable detail elsewhere in this brief. Judge McCulloch, the District Court Judge who was affirmed by the Supreme Court of the United States in his holding that the Norris-La Guardia Act did not apply to the facts of that case, later decided the case of *United States v. Dairy Co-Op. Assn.*, 49 Fed. Supp. 475, wherein he said:

“An older generation of judges interpreted the Clayton Act, 38 Stat. 730, to defeat the plain intent of the law, and, almost perversely, it seemed, sought to impose their economic views on the American scene in the controversial field of capital and labor. The result was the enactment of the Norris-LaGuardia Act, 29 U.S.C.A. \* \* \*

Now I am asked to ‘interpret’ the other provisions of the Clayton Act which say generally that a farmers’ cooperative association shall not be subject to the Anti-Trust laws. I am asked to hold that under certain circumstances, even when acting solely in its self-interest, and not in concert with others, a farmers’ cooperative can be punished as a monopoly. I am asked to hold that in this case, which I am told is the first case brought by the Anti-Trust Division of the Department of Justice against a farmers’ cooperative acting alone and not in concert with others, the defendant is attempting to create a monopoly and is punishable criminally. In short, I am asked to scuttle the plain language of the Clayton Act as to cooperatives, as anti-labor courts

scuttled the labor provisions of the same act, with the serious consequences that endure to this hour.

It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said that cooperatives were not to be punished, even though they became monopolistic, it would be as ill-considered for me to hold to the contrary as were some of the early labor decisions, more ill-considered in fact, in view of the serious consequences to the American people, now known to have followed from those decisions in the labor field."

The defendant Local 36 is in the same economic category as a farmers' cooperative and the Clayton Act applies equally to it.

6. **Moreover an employer-employee relationship within the meaning of the Norris-LaGuardia Act does exist between defendant fishermen and the fish dealers involved herein.**

As stated above, the existence of an employer-employee relationship is not determinative of the application of the Clayton Act to the facts of this case. If it were, however, it is submitted that the evidence presented to the Court below requires the conclusion that such a relationship within the meaning of the Norris-LaGuardia Act does exist.

In the case of *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, 86 L. Ed. 750, *supra*, the Supreme Court did hold that no such relationship existed between fishermen and the fish buyers. How-

ever, an examination of the first opinion of the Circuit Court in that case (appearing at 117 Fed. (2d) 311, and setting forth the facts more fully than does the Supreme Court) shows that no such facts were presented to the Court as are in evidence here. In that case the record merely established that the fishermen were organized in a Union, and that they sold their fish to dealers. There was nothing in the record concerning the relationship between the fishermen and the dealers upon the basis of which the Court could look through the technical relationship to the real one existing between the parties. After the Supreme Court reversed the Circuit Court's ruling that the Norris-LaGuardia Act did apply, the Circuit Court reconsidered the matter in accordance with the mandate of the Supreme Court and said:

“Appellants, by their combination, have acquired the power to fix the prices of fish and control the production thereof which deprives consumers of the advantages which accrue to them from free competition in the market.” *Hinton v. Columbia River Packers Assn.*, 131 Fed. (2d) 88, 89.

In this case the defendants did offer evidence to establish that the fishermen are actually at a greater economic disadvantage with respect to the dealers than employees usually are with respect to their employer, and further, that fishermen have absolutely no power to affect consumer prices. The facts do appear in this record which were recognized by the National War Labor Board when during the war, it fixed prices to fishermen as constituting wages. In a typical panel report which was later approved by the

National War Labor Board, the panel said the following:

“\* \* \* from an economic point of view both independent and company fishermen are really employees, since the price they receive for fish is substantially and in essence a wage. The payments or differentials paid or allowed with respect to boats and gear are in essence only rental payments. *Fishermen are not in business for a profit on their capital, a condition which is a characteristic of an independent entrepreneur.*

#### PANEL RECOMMENDATIONS

*In the opinion of the Panel, the fishermen—independent and company—in reality are laborers (not entrepreneurs) who furnish in a variable degree the tools of their trade.* In most cases the fishermen begin to fish with equipment furnished by the Companies, and then in time many of them are able to buy their own boats and equipment. Fishermen like to own this equipment. They can fix it to suit their individual needs and keep it in a good state of repair. The price differential they receive also enables them to make wages in servicing the boat before and after the season. The capital earnings which they secure on their investment, however, is only a small fraction of their total earnings. Strictly speaking, the fishermen represent venture labor rather than venture capital.

#### *Recommendation No. 1*

In view of the fact that the fishermen are essentially a labor force, it is recommended that *for purposes of negotiations and bargaining rela-*

*tionships*, any dispute as between fishermen (company and independent) and the industry shall be regarded as a labor dispute over which the War Labor Board should assume jurisdiction." *In the Matter of Alaska Salmon Industry, Inc.*, Case No. 111-7617-D, Before the 12th Region of the National War Labor Board, 27 WLR 760.

This same economic reality has been recognized by the Courts. Thus, in *U. S. v. Peterson*, 28 Fed. (2d) 29, 30, the Court said: here the fishermen's earnings "are to be treated as wages, whether the compensation was to be made in kind or money." Cf. *U. S. v. Laslin*, 24 Fed. (2d) 683.

In the case of *N.L.R.B. v. Hearst*, 322 U. S. 111, 88 L. Ed. 1170, it was held that under the Wagner Act, a man does not have to be on the regular payroll to be an employee. Because the anti-trust laws, and various amendments thereto, are, like the Wagner Act, based upon economic consideration, the following language from that case is particularly pertinent here (pp. 127, 128):

"Interruption of commerce through strikes and unrest may stem as well from labor disputes, between some who, for other purposes, are technically 'independent contractors' and their employers as from disputes between person who, for those purposes, are 'employees' and their employers. Cf. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63, 61 S. Ct. 122. Inequality of bargaining power in controversies over wages, hours and working

conditions may as well characterize the status of the one group as of the other. The former, when acting alone, may be as 'helpless in dealing with an employer,' as 'dependent \* \* \* on his daily wage' and as 'unable to leave the employ and to resist arbitrary and unfair treatment' as the latter. For each 'union \* \* \* (may be) essential to give \* \* \* opportunity to deal on equality with their employer.' And for each, collective bargaining may be appropriate and effective for the 'friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions.' 49 Stat. 449, c. 372, 29 USCA Sec. 151, 9 FCA title 29, Sec. 151. In short, 'when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the end sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.'

Likewise in the case of *N.L.R.B. v. E. C. Atkins & Co.*, 91 L. Ed. Advance Opinions 1157, 1160-1, the Court was required to interpret the words "employee" and "employer" under the Wagner Act. With respect to these terms, the Court said:

"And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this

statute. This does not mean that it should disregard the technical and traditional concepts of 'employee' and 'employer'. But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. \* \* \* Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees."

Cf. *National Labor Relations Board v. Blount*, 131 Fed. (2d) 585, certiorari denied 87 L. Ed. 1157, 318 U. S. 791.

Where the facts revealing the economic relationship between persons dealing with each other are not presented, the Courts can do nothing but look to the technical aspects of that relationship for the purpose of ascertaining its nature. That was precisely the situation the Court was in when the *Hinton* case was presented to it. Here, however, the facts indicating the true nature of that relationship have either been presented or offered. It follows that the basic and realistic tests laid down in the *Hearst* and *Atkins* cases must be applied here, rather than the technical one, which of necessity the Court was forced to apply in the *Hinton* case.

In *Rutherford Food Corp. v. McComb*, 91 L. Ed. Adv. Opinion 1350, the same nontechnical approach was followed in determining whether an employer-employee relationship existed within the meaning of the Fair Labor Standards Act. In that case the

Court took cognizance of the fact that the Fair Labor Standards Act, "concerns itself with the correction of economic evils" and that therefore it is necessary to consider the "underlying economic realities". The Clayton Act, like the anti-trust law itself, was designed to deal with "economic realities". In this case the record lifts the veil from the technical relationship and reveals the underlying reality that insofar as the purpose and intent of the Clayton Act are concerned, defendant fishermen stand in the economic position of employees in relation to the dealers.

In *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91, 85 L. Ed. 63, certain dairies made sales of milk to individuals operating their own trucks who in turn resold the milk to retail stores. Other dairies hired truck drivers who performed the same function, and these truck drivers were members of American Federation of Labor unions. The defendant union tried to stem the spread of the vendor system, contending that it constituted unfair competition and depressed labor standards. In this connection, it picketed the stores serviced under the vendor system. The Supreme Court affirmed the holding of the District Court, that it lacked jurisdiction because of the Norris-LaGuardia Act and therefore could not grant an injunction. In discussing the Norris-LaGuardia Act, the Court said (p. 99):

"To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no 'labor dispute,' is to ignore the statutory definition of the term; to say, further, that the conditioned aban-



donment of the vendor system, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eyes to the everyday elements of industrial strife."

In regard to the existence of a labor dispute, the Court discussed and applied the definitions contained in 13(a), (b) and (c) of the Act, saying (p. 93):

"The Norris-LaGuardia Act applies to labor disputes between 'persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests herein.' Here, *all* of the parties have 'direct or indirect interests' in the production, processing, sale, and distribution of milk."

In the present case all of the dealers and all of the fishermen were interested in the production of fish. At least those fishermen who had no interest in any boat were employees whose wages were determined on a piece-rate basis by the price that was paid for fish. The only way they could increase their wages was to increase that piece rate. This could not be done without at the same time raising the piece rate for the boat owners who, defendants contend, are also employees. But whether or not the boat owners are employees, the non-boat owners are in that category and therefore the dispute in this case concerned a price or piece-rate contract, and was a labor dispute within the meaning of the Norris-LaGuardia Act.

**Summary.**

The trial Court erroneously instructed the jury that in order for the Clayton Act to apply, an employer-employee relationship between the fishermen and the dealers was a prerequisite, and that the fishermen and the dealers had to be engaged in an employer-employee labor dispute; the trial Court erroneously refused instructions to the effect that the Clayton Act did apply if the sale of the fish by the fishermen to the dealers was basically a rendition of services or a transaction involving fundamentally the expenditure of human labor.

Furthermore, the Court erred in refusing to instruct the jury that for the purposes of this case an employer-employee relationship might exist if there was basically a sale of labor plus a lack of equal bargaining power, even though for other purposes the fishermen technically might be independent contractors. These errors went to the heart of the issues presented to the jury and were therefore, of course, extremely prejudicial.

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**C. THE COURT GAVE ERRONEOUS INSTRUCTIONS AND REFUSED TO GIVE CORRECT INSTRUCTIONS WITH RESPECT TO THE APPLICATION OF THE ANTI-TRUST LAWS TO FISHERMEN WHO WERE ORIGINAL WORKING PRODUCERS.**

See 'Appendix N, pages 49-52, for defendants' requested instructions which were refused.

Appellants contend that, even apart from the immunities extended by the Fishermen's Cooperative Marketing Act, the collective action of fishermen is

not in restraint of trade. Many of the arguments given below are summaries of economic studies and of discussions contained in decisions, citations of which are likewise given.

Fishermen are "original producers"; this is to say that a product comes to being in their hands for the first time, as a result of their labor. Like farmers, their produce has no previous owner and it reaches the fisherman by *labor*, not by purchase. Original producers are unlike manufacturers in that in the case of manufacturers the product is fashioned and assembled from other products; and although labor is an ingredient in the manufacturing process it is usually not the principal ingredient, and it is usually the hired labor of others. In the case of farmers and fishermen, the principal ingredient is labor, the labor of the man who disposes of the product, not the labor of his employee.

The dealer's "net" is profit on a sale. He has laid out money and has taken back a larger sum. His venture is dollars. The manufacturer is much in the same situation. He has risked money for plant, materials and wages. His "net" is the overplus of return over his ventured capital. The fishermen, farmers, and other original producers (other than the corporate producer, the factory farmer, which is essentially a manufacturer) lays out a minimum of money for tools. His expenditure is labor. His return is not an overplus; it is not a "margin". His return is essentially a wage, compensation for his labor.

The farmer invests in his land, in equipment, and perhaps in wages for auxiliary farm labor at harvest; but he does not invest in the products of the land. Similarly, the fisherman may invest in a boat and gear, but he does not invest in the fish he has caught. (In this respect the fisherman is worse off than the farmer; under California law he does not even own the fish, and cannot enjoy the doubtful privilege of destroying it either to create a scarcity or to prevent an oversupply; he does not share the dairyman's anti-social "right" of pouring milk on the highway.)

Original producers have been recognized to occupy a privileged position in the national economy. The essential stuff for the life of a nation's peace comes to being through their labor. The ordinary tests for the survival of a business are not permitted to apply in the case of original producers. That the production of milk or wheat would entail a financial loss would not necessarily lead to its cessation, as it would in the case of almost any other business. Government subsidies and special legislation of all kinds evidence the peculiar position of original producers in the economic structure of the nation.

Original producers are often persons of small means, and are usually scattered over a large area. This is necessary because of the character of their work; since they derive their products by contact with the land and the sea, the man-land ratio is much greater in the case of original producers than it is, to take another extreme, in the case of textile manufacturers.

Original producers are usually not equipped to undertake marketing to the consumer. Distribution and marketing are operations which are not economically feasible on the small scale available to the original producer, the quantity of whose products is limited by the productive capacity of his own hands. For this reason original producers usually dispose of their products to a dealer, whose economic strength is far greater than that of the producer.

The dealer occupies a middle position. In his transactions with the original producer his position is superior because he has the power to refrain from buying, whereas the original producer, because of the perishable character of his product, does not have the economic power to refrain from selling. On the other hand in his relationship to the consuming public the dealer's position is likewise strong. Dealers are relatively few, the consuming public is large. Organization, formal or informal, is simple and common among the dealers, and relatively impossible among the consuming public. In any event, the consuming public has to buy; whereas the dealer usually has the facilities to store if he is not satisfied with the current price.

The result of the relative position of the original producer, the dealer, and the consuming public is that the price to the producer has practically no effect whatever on the price the consumer pays. The margin between the dealer's purchase price and costs is largely within his control. He can dictate the former

to a large extent. This is particularly true in the case of the fishermen because in the absence of a collective agreement the transaction has the characteristic of a forced sale. The dealer's price to the consumer is usually determined not by competition among dealers but by competition between different commodities. Thus the retail price of fish has no relationship to the price the dealer pays to the fisherman, but is determined by the quantity of product available and the retail price of meat, cheese and eggs.

Collective action among producers does not raise the price to the consumer. It permits the producer to get a fair return; the work is thus made more attractive, and more farmers or fishermen go into production. The supply is thus increased; and more often than not the price to the consumer is lowered as a result.

Collective action among producers protects the group against a combination among buyers to depress the price paid to producers.

“The farmer may suffer because monopolistic elements on the selling side make for higher food prices (due to branding, resale price maintenance, local partial-monopoly in retailing, customary ‘mark-ups’, or for whatever reason) which may be passed back to him in the form of a restriction of aggregate demand for the farm product which he sells, hence a lower price for his product. Only if farmers are strongly organized, either cooperatively or through government control, so that part of any monopolistic gains may

accrue to themselves, may it be in the farmer's interest that prices to consumers are higher than the purely competitive level. Even where farmers are so organized, each is interested primarily in total net income, which depends not only upon price, but also upon the quantity he is allowed to sell by the central authority and his costs of production." (Nicholls, *Imperfect Competition Within Agricultural Industries* (1941), Iowa State College Press, page 155).

*Owen Co. Burley Tobacco Soc. v. Brumbach*,  
128 Ky. 137, 107 S. W. 710;

*Tobacco Growers Coop. v. Jones*, 185 N. C.  
265, 117 S. E. 174, 33 A.L.R. 231.

See also:

*Investigation of Concentration of Economic Power*, TNEC Report, pp. 384 to 406; 453; 2821 et seq., 2873;

*Problems of Monopoly and Economic Warfare*, F. Zeuthen (London, 1930);

*Monopoly Supply and Monopoly Demand*, A. J. Nicholls, University of Chicago Press.

Collective action among producers rationalizes marketing methods by preventing wasteful flooding of the market and stimulating flows of supplies when there is a consumer demand.

*Warren v. Alabama Farm Bureau*, 213 Ala. 61,  
104 So. 264;

*Washington Cranberry Growers Ass'n. v. Moore*, 117 Wash. 430, 201 P. 773, 25 A.L.R. 1077.

It tends to eliminate the wasteful spread between the producers return and the consumer price.

*Minnesota Wheat Growers v. Higgins*, 203 N. W. 420;

*Dark Tobacco Growers Ass'n. v. Dunn*, 150 Tenn. 614, 266 S. W. 308.

All of this was recognized in the common law. Inhibitions against restraints at common law were directed solely against traders and middlemen. (See "*The Masquerade of Monopoly*", Frank Herbert Feller, Harper, Brace & Company (1931).

The common law of restraints was imported into the Sherman Act. Not only is this the holding of the *Apex* case, but it is apparent from an examination of the legislative history of the act itself. The bill when it was originally introduced was aimed *directly* at the raising of prices through combinations and conspiracies to prevent full and free competition. (See discussion of this in Chapter 2 of "Labor and the Sherman Act," by Professor Edward Berman-Harper's, 1930.) It was immediately criticized that a bill in such form would outlaw both the Farmers' Alliance and the Knights of Labor. Senator Sherman himself offered a proviso exempting labor and farmers' organizations and it was adopted in the committee of the whole without the formality of a roll call. (Berman, p. 21.)

Then the bill was re-referred to the judicial committee for redrafting. When it emerged from that committee a few days later, the Sherman Act was



*no longer directly* aimed at combinations to raise prices. The committee draftsman escaped the difficult constitutional job of discriminating between "good" and "bad" combinations to raise prices by simply dropping the whole original idea. Instead, as Justice Stone said in the *Apex* case, 310 U. S. 469, at 498, 84 L. Ed. 1311, 1325-26:

"\* \* \* the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law *they took over that concept* by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints." (Emphasis added.)

Under the revamped bill, it was apparent that only common law restraints of trade were to be punished. Since it was well known that this field of the common law only concerned the activities of traders and the market place, there was no longer any necessity for the proviso as to agricultural and labor organizations. The proviso was dropped out not because the Senate had changed its mind about exempting labor and agriculturists but rather because their new bill could

not be applicable to the pursuits of original producers.

It is well known that in 1890 the Congress was in a hurry to pass a bill which would prohibit trusts. As Senator Platt said, "It has been in the line of getting some bill with that title that we might go to the country with." (Berman, p. 27.) Consequently, instead of taking the pains of careful draftsmanship, the Congress merely took the readymade common law of restraints of trade and made a Federal statute out of it. Congress was not completely satisfied with this *indirect* attack on combinations to raise prices; bills like the Sherman Act in its original form with the same *direct* provisions as to price-raising combinations and the exemption of farmer and labor organizations were introduced by one senator and four representatives in 1892, and by another representative in 1898. (Berman, p. 12.) But none of these bills was ever passed.

Thus it is clear that in the mind of Congress in 1890, only a statute aimed *directly* at combinations to fix prices would affect combinations of laborers or farmers to raise their wages or prices for their products.

It is also clear that no such consideration for agriculture or labor was felt necessary when the common law of restraints of trade was being adopted into the Federal statute. These laws had only affected traders in the past and had never been applied to original producers such as laborers or agriculturists.

When earlier in this century agricultural co-operatives were organized in most states of the Union, they were attacked in the Courts on many grounds, two of which are important to the discussion here. First, it was argued that they were in restraint of trade and thus violated the Sherman Act, similar state statutes, and provisions in state constitutions against restraint of trade and monopoly. Second, in those instances where there were statutory exemptions for agricultural cooperatives, the exemptions were attacked as violating the Fourteenth Amendment on the ground that there was no reason to classify them separately from business, trade and manufacture.

Those controversies are now history. That agricultural cooperatives had an extremely difficult time in the Courts is evidenced by the passage of the Capper-Volstead Act. It is apparent that the language of the Clayton Act, naming agricultural and horticultural cooperatives was found insufficient; and specific congressional legislation in favor of agricultural cooperatives proved necessary. But the victory of agricultural cooperatives in the Courts, even prior to the passage of the Capper-Volstead Act, is relevant to the present appeal because it shows that collective action by original producers is not in restraint of trade; and victories subsequent to the Capper-Volstead Act and subsequent to the passage of specific legislation indicates that the exemption in favor of agricultural cooperatives was justified by the essential differences between original producers and other forms of enterprise.

Because the working fisherman is an original producer and is not in any relevant essential different from the farmer, quotations from landmark decisions dealing with agricultural cooperatives are set forth at Appendix "O", pages 53-61.

In the case at bar we think it will be conceded that the fisherman is economically indistinguishable from the farmer. All of the factors which removed the activity of farmers from the orbit of common law restraint of trade are present in the case of fishermen: the fact that the fisherman is an original producer, that his return is substantially compensation for labor, that he is of small financial means, that he is unable to deal on an equality with the fish dealers, that the fluctuations in prices paid to fish dealers are independent of the level of the retail price paid by the consumer, and that collective action is absolutely essential in order to permit the industry to survive. We submit that the activity of Local 36 is not forbidden by the Sherman Act.

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**D. THE COURT ERRED IN ITS INSTRUCTIONS WITH  
RELATION TO THE RULE OF REASON.**

1. **Error was committed by the Court in the instructions which it gave with relation to the rule of reason.**

The Court instructed the jury as follows:

"If you find that the fishermen members of defendant association are in fact business men as charged in the indictment and that the defendants have in fact combined and conspired among them-

selves to fix the price at which the individual members sell their fish to the dealers, then it is immaterial whether the price so fixed by agreement among the defendants is reasonable or unreasonable.

Price-fixing includes more than the mere establishment of uniform prices. Prices are fixed within the meaning of these instructions if the prices to be charged by the individual fishermen members of defendant Local 36 are to be at a certain level; or on ascending or descending scales, or if they are to be uniform, or if by various formulae they are to be stabilized. Price-fixing also includes placing a floor under the market, a floor which may serve the function of increasing the stability and firmness of market prices, and which may prevent the determination of those prices by free competition alone. \* \* \*

You are instructed that the elimination of so-called 'competitive evils' in an industry is not a legal justification for price-fixing contracts otherwise illegal. Ruinous competition, financial disaster, and evils of price-cutting are not available to justify the action or conduct of persons engaged in an unlawful combination to fix and determine in an arbitrary manner prices of commodities sold in an interstate market. Genuine or fancied competitive abuses are no legal justification for illegal price-fixing combinations or conspiracies, and the good intentions of the members of any such illegal combination are likewise immaterial." (Tr. 1940, 1946.)

The defendants objected on the grounds that the rule of reason does apply to price fixing agreements

under the facts of this case. (See Appendix P, pp. 62-63, for statement of defendants' objections.)

**2. The Court erred in refusing to give instructions proposed by defendants.**

See Appendix Q, pages 64-68, for defendants' proposed instructions which were refused by the Court.

The proposed instructions which were refused set forth three principal matters. First, that the rule of reason is applicable in this case; second, specification of some tests to be utilized in applying the rule of reason; and third, that the Sherman Anti-Trust Law is intended to apply only where the restraint has a tendency to affect consumer prices.

Because the District Court instructed the jury that the rule of reason did not apply at all, the appellants will limit themselves to a consideration of the question relating to the applicability of the rule of reason to the facts of this case.

**3. The rule of reason is applicable to working original producers who combine for the purpose of obtaining uniform stabilized price agreements between themselves and wholesalers or other middlemen.**

The trial Court held that the purpose of the combination which is the subject of the indictment herein was to fix prices between the fishermen and the dealers and that any combination for the purpose of fixing prices is illegal *per se*.

In reaching its conclusion, the trial Court overlooked a number of basic considerations. The fact that the cases laying down the rule that price fixing

agreements are illegal *per se* involve combinations and aggregations of industrial capital was completely ignored. Of course, the Supreme Court has held consistently that such combinations because of the potential power which they have to harm the public are illegal *per se*. To conclude therefrom that the same rule must automatically be applied to working original producers in their relations with middlemen is to take a step which neither reason nor precedent supports.

The underlying distinction between the combinations of industrial capital and combinations of agricultural or other producers has perhaps been stated best in the authorities upholding the constitutionality of agricultural marketing or cooperative acts which wholly or partially exempt combinations of agricultural workers from the provisions of anti-trust laws. In the case of *List v. Burley Tobacco Growers Co-op. Assn.*, 114 Ohio State 361, 151 N.E. 471, it was contended that such a law was unconstitutional because it constituted an unreasonable and arbitrary classification and an unlawful discrimination against industrial combinations. In holding the classification a valid one, the Court said:

“In determining whether co-operative associations organized for the purpose of marketing agricultural products are such a favored class as to be within the inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in

any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities."

The most interesting feature of this case is that in it a combination of tobacco growers aggregating not less than three-fourths of all of the aggregate production of burley tobacco in Kentucky, Indiana, Tennessee and Ohio entered into a single marketing agreement. The validity of this agreement was sustained not only under the cooperative marketing law of the state of Ohio, but also under the rule of reason. The Court so held despite the fact that the Ohio anti-trust law "is in much broader and stronger terms than the federal enactment." Nevertheless, upon the basis of findings of fact to the same general effect as those noted by the Court in upholding the cooperative statute as a valid classification of agricultural associations, the Court held that the rule of reason applied to the combination, and that there was not an unreasonable restraint of trade. In this connection, the Court said:

"On the other hand, it is recognized that competition may be reasonable or unreasonable. It may promote sound and sane relations between supply and demand, or it may ruinously place



producers at the mercy of consumers and middlemen."

The Appellate Court agreed with the finding of the trial Court that the testimony did not show that the methods used by the cooperative were calculated "to increase the cost of the finished product to the consumer." The Court then stated:

"The government reports clearly indicate that this cooperative effort is stimulating increased production, and the reason is not far to seek. The mere fact of stabilizing marketing conditions has inevitably caused a steadier market and an increased production. \* \* \* It is apparent that the pool is not able to control prices. The census shows that there are more than 6,000,000 farmers in the United States, and it is manifestly impossible to 'corner' any branch of agricultural production."

Finally the decision pointed out that "the number of manufacturers of burley tobacco is quite limited and the number of growers is quite large." Thus, this case is authority for the proposition that the very reasons which justify the special classification of original producers exempting them from the provisions of the anti-trust laws require the application of the rule of reason to contracts which, if they had been entered into by industrial aggregations of capital, would have constituted *per se* violations of the anti-trust laws.

The case of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, held that the exemption of agricultural associations from the anti-trust laws

constituted an arbitrary classification. The case of *Liberty Warehouse Co. v. Burley Tobacco Growers Co-Operative Marketing Assn.*, 276 U. S. 71, 72 L. Ed. 473, while not expressly overruling the *Connolly* case, undermined the concept upon which the *Connolly* case is based and pointed the way to its early demise. In the *Liberty Warehouse* case the Court pointed out that cooperative marketing statutes substantially like the one under consideration in that case had been enacted by 42 states, saying (p. 94):

“These statutes reveal widespread legislation approval of the plan for protecting scattered producers and advancing the public interest.”

The Court then noted that except for the Supreme Court of Minnesota, not a single Court has condemned any essential feature of these statutes. The opinion then goes on (pp. 93, 94):

“In the court below it was said:

‘We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handler between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is

also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.' (208 Ky. 649, 271 S. W. 695.) \* \* \*

In *Manchester Dairy System v. Hayward* (1926) 82 N. H. 193, 132 Atl. 12, the supreme court of New Hampshire said:

'Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products. \* \* \*'

Most important is the fact that this decision equates the protection of "scattered producers" with the advancement of "the public interest". It recognizes that the "common interest" is advanced by allowing combinations of agricultural producers precisely because such combinations result in increased prices to the producers.

In holding the rule of reason inapplicable in the present case, the Court below relied primarily upon the case of *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129. On the very day that the Supreme Court decided the *Socony-Vacuum* case,

it also handed down a decision in the case of *Tigner v. Texas*, 310 U. S. 141, 84 L. Ed. 1124, which latter case put to rest the case of *Connolly v. Union Sewer Pipe Co.*, supra, once and for all. In the *Tigner* case, the Court said:

“Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who, as producers, as well as consumers, constituted the most dispersed economic groups. These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. \* \* \*

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process.”

To recognize on the one hand that, because of the difference in functions and forces in our agricultural economy as distinguished from the balance of the economic process, there is a conception “of price

and production policy for agriculture'' very different from that which underlies the demands made upon industry and commerce by anti-trust laws, and on the other hand to urge that the rule that all price-fixing agreements are *per se* illegal simply because they have been so held with respect to industrial combinations, is anything but consistent.

The similarity between working fishermen and agricultural producers has been noted elsewhere in this brief and need not be given detailed consideration here. Suffice it to point out at this time, that the fishermen, too, are confronted with the problem of a small number of buyers on the one hand and a large number of sellers on the other, with necessity of immediately disposing of a perishable product, and with a history which indicates that higher prices to the working producer means increased production and in the long run lower prices to the consumer. The rule that price-fixing agreements are *per se* illegal when applied to industrial combinations arises from the fact that in every respect the tendencies and potentialities of such contracts are exactly the opposite from those which exist with respect to combinations of working producers. The Court below followed precedent by applying the same precedent to exactly opposite situations.

Furthermore, the Sherman anti-trust law cannot be considered here without reference to the Clayton Act and to the Fishermen's Marketing Act.

*United States v. Hutcheson*, 312 U. S. 219, 85 L. Ed. 789.

(See Appendix R, pp. 69-70, for discussion by Court.)

Because of the historical and legislative relationship between the Sherman Anti-Trust Act, the Clayton Act and the Fishermen's Marketing Act, they must be read together as part of a single "harmonizing text". Having done this, it is not enough to follow the bare words of the integrated text, but what must be sought and applied is the policy underlying it.

How does this all affect the application of the rule of reason? As Mr. Justice Holmes stated in the case of *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, 83 L. Ed. 784, 789, cited in the *Hutcheson* case, *supra*, "a statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind." Regardless of what the policy may have been prior to the enactment of the Clayton and the Fishermen's Marketing Acts, the policy established therein is to permit combinations of working producers, such as the fishermen involved in this case, for the precise purpose of obtaining greater returns for their product and their labor. Such a policy cannot be reconciled with the concept that price-fixing agreements obtained by combinations of working fishermen are *per se* illegal. To the contrary, the express policies of Congress would seem to require the conclusion that such price-fixing agreements are legal and do not constitute violations of the Sherman Anti-Trust Law, except

perhaps where they are clearly unreasonable and arbitrary.

4. The rule that price-fixing agreements are illegal per se applies only where such agreements are imposed by a combination having the potential power to fix prices to the consumer.

Many cases recognize that the basic objective of anti-trust laws is to protect the consumer. Thus, in the case of *List v. Burley Tobacco Growers Co-Op. Assn.*, 114 Ohio State 361, 151 N. E. 471, 476-7, the Supreme Court of Ohio held that a combination entering into price agreements which did not have the actual or potential power to increase the cost of the finished product to the consumer could, without violating the state anti-trust law, enter into price-fixing agreements which would then be tested by the rule of reason. In the case of *Board of Trade v. United States*, 246 U. S. 231, 240, 62 L. Ed. 683, 688, Mr. Justice Brandeis, in holding legal the Board of Trade rule which fixed prices for certain hours of the day, said with respect to that rule:

“In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.”

Thus, the Supreme Court recognized that a rule which resulted in higher prices to farmers, was in accord with the intent of the Anti-Trust Law, by reason of the fact that it resulted in increased prices to the farmer.

In *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, 89 L. Ed. 1939, the Court in referring to *Apex Hosiery Co. v. Leader*, 310 U. S. 469, said:

“The opinion in that case, however, went on to explain that the Sherman Act ‘was enacted in the era of “trusts” and “combinations” of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern;’ that *its purpose was to protect consumers from monopoly prices*, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade.” (Emphasis ours.)

Perhaps the most important case on this point is that *Appalachian Coals v. United States*, 288 U. S. 344, 77 L. Ed. 825.<sup>1</sup> It should be noted first of all that this case has never been overruled and is in effect cited with approval, although distinguished, in the very cases which lay down the rule that price-fixing agreements are illegal *per se*. And the *Appalachian Coals* case is perfectly consistent with the “*per se*” cases because in the former, the Court found that consumer prices were not fixed whereas in the latter the Court found that consumer prices were controlled by the illegal combination. Although the *Appalachian Coals* case sometimes refers to market prices and sometimes to consumer prices, it is obvious that these terms are used by the case and by other cases practically interchangeably. Thus, the Court said:

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<sup>1</sup>Because of the numerous times that this case will be referred to below, it will hereafter be referred to merely as the “*Appalachian Coals* case”.



“The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendants’ plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to *market prices* and other matters affecting the public interest in interstate commerce in bituminous coal.” (Emphasis ours.) 288 U. S. 361, 77 L. Ed. 830.

At a later point in the decision, the Court goes on to say:

“When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry. So far as actual purposes are concerned, the conclusion of the court below was amply supported that defendants were engaged in a fair and open endeavor to aid the industry in a measurable recovery from its plight. The inquiry, then, must be whether despite this objective the inherent nature of their plan was such as to create an undue restraint upon interstate commerce.

The question thus presented chiefly concerns *the effect upon prices*. The evidence as to the conditions of the production and distribution of bituminous coal, the available facilities for its transportation, the extent of developed mining capacity, and the vast potential undeveloped capacity, makes it impossible to conclude that defendants through the operation of their plan will

be able to fix *the price of coal in the consuming markets.*” (Emphasis ours.) 288 U. S. 372-3, 77 L. Ed. 836.

A few sentences later, the Court again says:

“The plan cannot be said either to contemplate or to involve the fixing of *market prices.*” (Emphasis ours.) 288 U. S. 372-3, 77 L. Ed. 836.

It thus appears that when the Court speaks about market prices or about prices, it is actually referring to “the price of coal in the consuming market.”

The fact that the combination actually engaged in price-fixing is beyond question. Thus, all of the members of the combination were required to deliver their products to it and the association then sold the coal of its principals. As the Supreme Court said:

“The plan contemplates that prices are to be fixed by the officers of the Company at its central office \* \* \*.” 288 U. S. 358, 77 L. Ed. 828.

Even further, prices were fixed in precisely the manner that the defendants in this case sought to fix prices. Thus the Court pointed out:

“In order to preserve their existing sales’ outlets, the producers may designate sub-agents, according to an agreed form of contract, who are to sell upon the terms and prices established by the Company and are to be allowed by the Company commissions of eight per cent.” 288 U. S. 358, 77 L. Ed. 828.

Thus, in the cited as well as in the instant case, the association alleged to have violated the anti-trust

laws fixed the prices at which its members would directly sell their products.

It is simply ridiculous to assert that there was no price-fixing in the *Appalachian Coals* case. What was lacking there and what was present in the case holding that price-fixing is *pre se* illegal was the actual fixing of prices or the potential power to fix prices in the consumer market. In the *Appalachian Coals* case, the price was fixed for the consumer by reason of other competitive factors, and the producers involved there were simply incapable of fixing the price to the consumer.

As a matter of fact the *Appalachian Coals* case goes so far as to hold that if the price to the consumer is merely affected but is not fixed by the combination, there is no violation of the anti-trust laws.

“The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. \* \* \* Putting an end to injurious practices, and the consequent improvement of the competitive position of a group of producers is not a less worthy aim and may be entirely consonant with the public interest, where the group must still meet effective competition in a fair market and neither seeks nor is able to effect a domination of prices.” 288 U.S. 374, 77 L.Ed. 837.

The instructions proposed by the defendants herein and rejected by the Court did not go so far as the

Supreme Court did in the *Appalachian Coals* case. The proposed and rejected instructions were to the effect that a price-fixing agreement did not violate the law unless it tended to affect consumer prices. See Instruction S-17, *supra*; Tr. 63-4.

It is not true, as the Court below seems to believe, that the rule that price-fixing agreements are *per se* illegal was first established after the decision in the *Appalachian Coals* case. As a matter of fact, that rule was laid down in the case of *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L.Ed. 700, and the existence of that rule was specifically recognized in the *Appalachian Coals* case:

“In *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L.ed. 700, 47 S. Ct. 377, 50 A.L.R. 989, defendants, who controlled 82 per cent of the business of manufacturing and distributing vitreous pottery in the United States, had combined to fix prices. It was found that they had the power to do this and had exerted it. The defense that the prices were reasonable was overruled, as the court held that *the power to fix prices involved ‘power to control the market and to fix arbitrary and unreasonable prices,’ and that in such a case the difference between legal and illegal conduct could not ‘depend upon so uncertain a test’ as whether the prices actually fixed were reasonable*, a determination which could ‘be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.’ ” (Emphasis ours.) 288 U.S. 375, 77 L.Ed. 837.

In the *Trenton Potteries* case and in all of the other cases where the *per se* rule has been adopted there existed the power to fix arbitrary and unreasonable prices to consumers. Where that is the case a price-fixing agreement is illegal regardless of whether the prices fixed are actually arbitrary and unreasonable. Where, however, that power does not exist as it did not in the *Appalachian Coals* case and as it does not in the present case, the rule of reason is applicable to the price-fixing agreement.

In the instant case the evidence shows not only that it was impossible for the defendants to fix prices at the consumer level, but that it was actually impossible for them to arbitrarily fix the prices at which they sold to the dealers. It was pointed out in the *Appalachian Coals* case that competition with coal from other areas prevented the Association in that case from arbitrarily fixing the price. In the instant case, likewise, particularly because the volume of fish coming in from outside the area is much greater than the volume of fish caught in the Southern California region, the dealer does not have to pay any arbitrary price in order to continue to do business. If he enters into an agreement to pay prices higher than that for competing fish from other areas, he can simply not buy fish under that agreement and obtain his supplies from outside the Southern California region. The fact is that fishermen do not have the power to fix an arbitrary price at any level, and have no power whatsoever to affect the price to the consumer.

Every sales agreement fixes prices for a transaction or series of transactions. Only where a group is in a position to determine or fix the general market price is an agreement fixing a contract price an unreasonable restraint of trade. In this case the power to enter into a price-fixing contract means only the power to establish an agreed-upon price, which of necessity must be a competitive price and which cannot possibly affect the consumer market. Even more, such an agreement does not tend to increase the prices charged by dealers to other middlemen. (See Appendix S, pp. 71-72, for factual data supporting this statement.)

That price fixing is not *per se* illegal in all cases is further evidenced by the case of *Standard Oil v. United States*, 75 L.Ed. 926, 283 U.S. 163, wherein a combination of oil companies fixed the rate of royalties on a number of patents which they owned and which they pooled by fixing the rate of royalties on the patents. In considering whether or not this combination and fixing of royalties constituted a violation of the anti-trust laws, the Court raised the question whether the combination had the power to fix prices. Obviously the Court was referring to prices to the consumer because at the industrial level, the very thing in issue was the fixing of prices for the use of the patents in question. Thus the Court said:

“The rate of royalties may, of course, be a decisive factor in the cost of production. If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is *tantamount to the power to fix prices*. \* \* \* But an agreement for cross licensing and division of

royalties violates the act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce." (Emphasis ours.) 283 U.S. 174-5, 75 L.Ed. 948.

Whereupon the Court proceeded to determine whether the fixing of royalty prices by the use of the patent actually tended to fix prices in the market or otherwise restrain trade. The question was answered in the negative because of factors which are directly pertinent here. Thus the Court noted that the pooling and price fixing arrangements actually resulted in "commercial expansion of competing processes". Here, too, lack of agreements results in commercial stagnation, existence of agreements leads to commercial expansion.

The Court then noted that the output of cracked gasoline was about 26% of the total gasoline production. The Court then said:

"Under these circumstances the primary defendants could not effectively control the supply or fix the price of cracked gasoline by virtue of their alleged monopoly of the cracking processes, unless they could control, through some means, the remainder of the total gasoline production from all sources." 283 U.S. 176, 75 L.Ed. 949.

Similar lack of control on the part of the fishermen has heretofore been noted.

The Court then went on to point out that "defendants and their licensees neither individually nor col-

lectively controlled the market price or supply of any gasoline moving in interstate commerce". So here, as has been shown, there is no relationship between the price charged by the fishermen and the consumer price or price which the dealers charge at the time that they ship the fish in interstate commerce. Therefore, the fishermen do not control the market price or supply of fish moving in interstate commerce. The conclusion which the Court then drew with respect to the lack of control of the gasoline market is particularly apt here:

"In the absence of proof that the primary defendants had such control of the entire industry as would make effective the alleged domination of a part, it is difficult to see how they could by agreeing upon royalty rates control either the price or the supply of gasoline, or otherwise restrain competition." 283 U. S. 179, 75 L. Ed. 951.

Finally, with respect to the rulings of the District Court, the Supreme Court said:

"The district court accepted the government's estimates of cracked gasoline production; found that the primary defendants were able to control both supply and price by virtue of their control of the cracking patents; held that although these patents were valid consideration for the cross licenses, the agreement to maintain royalties was in effect a method for fixing the price of cracked gasoline; and concluded that a monopoly existed as a result of such agreements. This appears to be the only basis for the relief granted. But the widely varying estimates, relied upon to establish



dominant control of the production of cracked gasoline were insufficient for that purpose. And the court entirely disregarded not only the fact that the manufacture of the cracked is only a part of the total gasoline production, but also the evidence showing active competition among the defendants themselves and with others. Its findings are without adequate support in the evidence. The bill should have been dismissed.” 283 U. S. 182-3, 75 L. Ed. 952-3.

In the present case the trial judge by his instructions did not merely incorrectly evaluate the testimony, but refused altogether to let the jury consider the very matter which the Supreme Court held to be determinative in the *Standard Oil* case.

The government's theory represents a complete misconception of the purposes of the anti-trust laws, insofar as they affect the relationship between those engaged in business transactions. The case of *Dr. Miles Co.*, which is *John D. Parks & Sons Co.*, 55 L. Ed. 502, 220 U. S. 373, points out the distinction between the objectives of the anti-trust laws as they affect consumers and the public, and these objectives insofar as they affect individuals or groups of individuals engaged in transactions between themselves. The Court said:

“With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. *But the public interest is still the first consideration.*” (Emphasis ours.) 220 U. S. 406, 55 L. Ed. 518.

The Court then goes on to quote the case of *Gibbs v. Consolidated Gas Co.*, 130 U. S. 409, 32 L. Ed. 984, as follows:

“Public welfare is first considered, and if it be not involved, and *the restraint upon one party is not greater than protection to the other party requires*, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.” (Emphasis ours.) 220 U. S. 406, 55 L. Ed. 518.

The Court then quotes from the case of *Lord Macnaghten in Nordenfellt v. Maxim Nordenfellt Guns & Ammunition Co., A. C.*, p. 565, 6 Eng. Rul. Cas. 413, as follows:

“But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford *adequate protection to the party in whose favor it is imposed*, while at the same time it is *in no way injurious to the public*.” 220 U. S. 406-7, 55 L. Ed. 518. (Emphasis ours.)

Because of the paramount importance of the public interest, any price fixing agreement where there is a potential power to fix prices to the consumer is *per se* illegal. But, where there is no effect on con-

sumer prices, a price stabilization agreement is valid unless it is clearly unreasonable as between the parties to the agreement.

The principal case relied upon the government and by the Court below, in holding that the rule of reason did not apply, is *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 84 L. Ed. 1129. This must be construed in the light of previous cases, none of which it purported to or did overrule. Actually, it is consistent with those cases if properly analyzed. Again and again in the *Socony-Vacuum* case emphasis is placed on the fact that consumer prices were affected by the combination. (See Appendix T, pp. 73-74, for statement of the Court on this point.)

Whereas in the present case the trial Court refused to permit any consideration of the effect upon consumer prices, in the *Socony-Vacuum Oil* case, the continued emphasis on consumer prices indicates that as constituting the matrix of the case. The Court, in the *Socony-Vacuum* case, did not ignore the *Appalachian Coals* case. It considered that case and distinguished it on precisely the grounds here urged on behalf of defendants:

“And it observed that the plan did not either contemplate or involve ‘the fixing of market prices;’ that defendants would not be able to *fix the price of coal in the consuming markets; that their coal would continue to be subject to ‘active competition’*. To the contention that the plan would have a tendency to stabilize market prices and to raise them to a higher level, this Court replied:

‘The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that co-operative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the co-operation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result.’ \* \* \*

Thus in reality the only essential thing in common between the instant case and the Appalachian Coals Case is the presence in each of so-called demoralizing or injurious practices. The methods of dealing with them were quite divergent. In the instant case there were buying programs of distress gasoline which had as their direct purpose and aim the raising and maintenance of spot market prices and of prices to jobbers and consumers in the Mid-Western area, by the elimination of distress gasoline as a market factor. The increase in the spot market prices was to be accomplished by a well organized buying program on that market: regular ascertainment of the amounts of surplus gasoline; assignment of sellers among the buyers; regular purchases at prices which would place and keep a floor under the market. *Unlike the plan in the instant case, the plan in the Appalachian Coals Case was not designed to operate vis a vis the general consuming market and to fix the prices on that market.*” (Emphasis ours.) 310 U. S. 215-216; 84 L. Ed. 1164.

*None* of the distinguishing factors found in the *Socony-Vacuum Oil* case are present here. *All* of the distinguishing factors found in the *Appalachian Coals* case are present here.

Every source examined indicates that combinations of working producers such as the fishermen here do not and can not increase the price to the consumer. Many of the sources have been previously cited. In the House Report on the Fishermen's Marketing Act, it was pointed out that associations of working producers to fix prices are common in Europe, and that the effect has not been to increase prices. (1934 House Reports, No. 1504.)

By reason of the mechanical application of the correct rule that when combinations of industrial capital engage in price fixing agreements, they are *per se* illegal, and by ignoring the fact that the anti trust laws were enacted primarily for the protection of the consumer against great combinations of capital, the Court below reached the conclusion that the *per se* rule applied to working fishermen seeking price fixing agreements with middlemen. As a result of this conclusion the Court refused to give instructions on the rule of reason and in fact instructed the jury that the rule of reason did not apply, thus committing prejudicial error.

**5. Applicability of the rule of reason to the facts of the present case.**

Unquestionably the leading case most nearly in point to the present case, both on the questions of

fact and law, is the *Appalachian Coals* case. In that case the combination consisted of approximately 75% of the producers of a certain type of coal in a specified area. In this case less than 75% of the market fishermen in the Southern California area are included in the combination.

In the cited case the Appalachian Coals Co. was a selling agent to whom the members of the company delivered their coal for sale by the company to various customers. However, in addition, the company set the prices at which its members sold some of their coal to customers of the members, thus acting partially as a sales agent and partially as a kind of collective bargaining agent. In the instant case the combination of fishermen sought to act through only one of the two methods followed in the cited case, the method selected by them being to have the association act as a bargaining agent for the members, with the members to make individual sales to the dealers.

The District Court in the *Appalachian Coals* case found that the combination would have the tendency to stabilize prices and to raise prices to a higher level than would prevail under conditions of free competition, but that the combination would not have the power to fix monopoly prices. In the present case the facts are even more favorable to the defendants. Their activities could not increase the price at the consumer to any extent, and at the level of their dealing with the middlemen they had to meet competitive prices of fish from the areas in any price agreement which they entered into with the Southern California

dealers, as well as the competition of other proteins which control the price of fish on the consumer market.

Next the Supreme Court stresses the economic condition of the industry, pointing out the condition of surplus production with a substantial relative decrease in consumption. In the present case the low earnings and great insecurity of the fishermen are abundantly clear. The fact that the Southern California area has a per capita consumption of fish about 50% less than the average throughout the United States and that the production of fish has remained constant in this area, while increasing by leaps and bounds in the areas where fixed price stabilization agreements have been signed, are economic factors of the same type as were given consideration in the *Appalachian Coals* case.

In the *Appalachian Coals* case the Court noted that the unfavorable conditions had been aggravated by particular practices with respect to what is known as "distress coal", that is, coal in certain sizes for which orders on the market are lacking. This can be compared to the situation of the fisherman who is compelled by conditions of nature and the Fish and Game laws to concentrate a great proportion of his catch in a short period of time, thus throwing on the market more fish than there is any demand for as of that particular time. As a result, he must accept "distress" prices while the middleman can sit back and hold his fish for all year around sale, thus maintaining constant prices in the retail market.

In the cited case the Court takes note of the fact that if coal is not sold the charges for storage, etc., "may exceed the amount obtainable for the coal." In this respect, the fisherman has an even more serious problem. If his product is not sold, it deteriorates and its value is destroyed completely, and what is more, he commits a criminal violation of law and is subject to having his license as a fisherman revoked.

Just as in the cited case, the producers of coal usually have no storage facilities of their own, so the fisherman has none. Moreover, the fisherman, for reasons which have been set forth, is not even in a position to utilize the storage facilities of others. He can do one thing and one thing only and that is sell his fish at whatever price he can obtain.

In the *Appalachian Coals* case it was pointed out that organized buying agencies "constitute unfavorable forces" because "the highly organized and concentrated buying power which they control and the great abundance of coal available has contributed to make the market for coal a buyer's market for many years past." The fisherman is constantly faced with a buyer's market.

In the cited case stress is placed on the unprofitable condition of the industry and the lack of local consumption in the area of production. The same factors exist for the fishermen in the Southern California area. At a time when throughout the country the problem was one of being able to purchase rather than to sell products at O.P.A. prices, at a time when



the economy was threatened not by low prices but by the black market, we find it necessary for the fishermen to combine in order to try to obtain the O.P.A. prices. Under conditions when the fishermen had to pay O.P.A. prices for everything which they purchased, they were simply trying to obtain O.P.A. prices for the fish that they caught. This is one of the best demonstrations of the relative weakness of the fishermen as compared with other groups in our economy. As a result of such weakness, the workers in the industry earned from \$800 to \$2500 a year, less than workingmen employed in the lowest paid categories. To say that the fishing industry was unprofitable to fishermen is indeed to put the matter mildly.

In the *Appalachian Coals* case an important factor was that the combination would not prevent substantial active competition in the sale of coal in all the markets in which Appalachian coal was sold. The small volume of fresh market fish caught in the Southern California area as compared with the competing fish caught elsewhere renders absolutely impossible the limitation of active competition in the sale of fish in all markets.

In the cited case consideration is given to the purposes for which the defendants organized themselves, such as to bring about "a better and more orderly marketing of the coal from the region", to enable the defendants "more equally to compete in the general market", to remedy certain destructive dumping practices, to promote the study of marketing and dis-

tribution of coal, to demonstrate the advantages and suitability of Appalachian coal, to promote an extensive advertising campaign and to provide a research department to deal with problems relating to the use of coal. Reference to our statement of the case will indicate precisely the same objectives were sought by the defendants in this case with relation to fresh market fish.

The Court in the *Appalachian* case notes that the record "fails to disclose an adequate basis for the conclusion that the operation of the defendants' plan would produce an injurious effect upon competitive conditions, in view of the vast volume of coal available, the conditions of production, and the network of transportation facilities at immediate command." 288 U. S. 363, 77 L. Ed. 834. Factors in the present case which require a similar conclusion are the value of fish available from other areas; seasonal nature of the industry; the restrictions placed upon fishermen by Fish and Game regulations; the natural monopolistic position held by dealers; the fact that fishermen have to compete with foreign fishing industries given governmental assistance and with agricultural and other economic groups in the United States which by reason of governmental assistance or otherwise, are in a much superior position to that of the fishermen; by the fact that the consumer receives no benefit from fluctuation of prices to fishermen because the dealer can wait for a favorable consumer market; by the small number of dealers as compared with the great number of fishermen and the resulting domi-

nant financial position of the dealers enabling them to unilaterally set the price that they will pay for fish; by the economic dependence of the fishermen upon the dealers as shown by their periodically regular indebtedness to the dealer; by the fact that organization in other areas has resulted in an increased production, whereas lack of organization in Southern California has prevented development of the fishing area; and by the fact that the fish coming from the organized area has been able to compete effectively with fish from the unorganized area. (See Appendix U, pp. 75-77, for further discussion of this point.)

In the case of *Board of Trade v. U. S.*, 246 U. S. 231, 62 L. Ed. 683, supra, the Court considered a number of factors in applying the rule of reason. It pointed out that the rule under consideration there "had no appreciable effect on general market prices" but that "within the narrow limits of its operations the rule helped to improve market conditions." It was noted that the rule in question enabled men to buy and sell with adequate knowledge of actual market conditions and that a lack of such knowledge was particularly disadvantageous to country dealers and farmers. It is precisely the lack of knowledge about the condition of the market and what he can get for his fish after he has caught it which makes the condition of the fisherman so precarious and so economically unsound. In the *Board of Trade* case it was noted that the rule had the effect of bringing products into trading in the regular market hours of the Board. Here, as we have noted by the collective

bargaining history in other areas, the effect thereof has been to increase the overall supply of fresh market fish. Far greater justification exists here for the contract sought by the defendants than existed in the *Board of Trade* case for the rule imposed by it upon its members.

The problems of the fishermen were well summarized in the investigation of concentration of economic power by the U. S. Senate Temporary National Economic Committee, when on Friday, February 21, 1941, Honorable Sumner T. Pike, the Commissioner of the Securities and Exchange Commission, testified:

“Mr. Chairman, I am afraid this is off the subject, but it has been quite impressive to me *how similar each one of these problems in agricultural distribution is to one smaller, much more neglected, but still quite important part of our industry, that is fish.* The thing that was just mentioned about marketing on the West Side of New York, in Washington Street, is, I think, even more true of the East Side, the Fulton Market. I lived within sight, and most distinctly within smell, of that market for some years, and could see it from my office window, and we have the same problem of small return to the fishermen, a tremendous spread between his price and the consumer’s price. Of course, we have the much more serious problem, probably, of perishability, and in almost every detail the thing seems to be parallel, except that your problem is much bigger, *but ours is just as serious to those of us who live on the seacoast,* and it has been, I think, a com-

paratively neglected area, I suppose because it is such a small thing in comparison with the bigger problem you present. \* \* \*” TNEC Reports, p. 405.

To refuse to apply the rule of reason to the facts of this case is truly unreasonable.

### Summary.

A working original producer can not by combination or association acquire the economic power to control the market price, to affect the price to the consumer or to otherwise unreasonably restrain competition. "To the contrary, the original working producer is in such a weak position economically that only by combination for the purpose of setting reasonable prices can reasonable competition between himself and the middleman, economically much more powerful, be maintained. Only thus can the original working producer obtain a reasonable share of the price which the consumer must ultimately pay. The rule of reason does not apply to price fixing arrangements entered into by industrial aggregations because such combinations have the potential power to harm the consumer. It should and does apply to price fixing combinations of original working producers not only because they lack that power but because it is in the public interest that they should receive a larger share of the consumer dollar than they now receive. The rule that price fixing agreements are *per se* invalid applies to those situations where there is a potential effect upon consumer prices. It does

not apply where, as here, there is no such potential effect. Nowhere, in any of the cases where the rule of reason was applied, was there greater necessity or justification therefor than in the present case. For these reasons the improper instructions and the refusal to give correct instructions on the rule of reason by the trial Court constituted prejudicial error.

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**E. THE COURT ERRED IN INSTRUCTING THE JURY WITH RESPECT TO THE BURDEN OF PROOF UPON THE GOVERNMENT TO ESTABLISH THAT THE CONSPIRACY CHARGED, IF EFFECTIVE, WOULD HAVE DIRECTLY AFFECTED INTERSTATE COMMERCE.**

**1. Instructions given by the Court.**

With respect to the necessity for proving a restraint upon commerce, the Court instructed the jury as follows:

“Any alleged or proved restraint by one or more of the defendants with the business of any so-called individual fish dealer or dealers mentioned in this case is not the controlling factor to be considered by you in arriving at your verdict in this case. The Government must prove a conspiracy to restrain in a substantial way the charge made in the indictment.” (Tr. 1938.)

Defendants objected to this instruction on the ground that by it the Government was not required to prove that the alleged conspiracy would have had a direct effect upon commerce.

Specifically the defendants objected as follows:

“The Court. No, it doesn’t have to be direct.  
Mr. Margolis. With regard to defendants’ instruction No. 4, we want to show that our objection to the refusal to give that instruction is an objection to give the instruction in the manner that it was last worded by your Honor, not as originally phrased by us.

Do I make myself clear on that point, your Honor? In other words, we object to the failure to give an instruction reading as follows:

‘I further instruct you that in this case the government must prove that the alleged conspiracy would have had a direct effect upon interstate commerce in fresh fish. \* \* \*’ (Tr. 1803.)

## 2. Applicability of the instructions to the facts of this case.

Without reviewing the applicable evidence it is sufficient to point out that defendants’ contention, which was supported by evidence, is that the intent of the agreement sought by the defendants was to have the fishermen know in advance what they would get for their catch before they went fishing, and that any alleged effect upon commerce was minor and indirect.

*Unless the conspiracy to restrain commerce is intended to have a direct effect upon commerce, it does not constitute a violation of the Anti-Trust Laws.*

In the case of *Industrial Association of San Francisco v. U. S.*, 263 U. S. 64, 69 L. Ed. 849, defendants were prosecuted under the Anti-Trust Act because of an agreement between a union and employers requir-

ing permits for the use of building material in the State of California. The Supreme Court considered and approved of the argument that this agreement would affect only indirectly the shipment of supplies into the State, by saying:

“This is to say, in effect, that the building contractor, being unable to purchase the permit materials, and consequently unable to go on with the job, would have no need for plumbing supplies, with the result that trade in them, to that extent, would be diminished. But this ignores the all-important fact that there was no interference with the freedom of the outside manufacturer to sell and ship, or of the local contractor to buy. The process went no further than to take away the latter’s opportunity to use, and, therefore, his incentive to purchase. The effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect, and remote,—precisely such an interference as this court dealt with in *United Mine Workers v. Coronado Coal Co.*, *supra*, and *United Leather Workers International Union v. Herkert & M. Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, 33 A.L.R. 566, 44 Sup. Ct. Rep. 623.”

In a well reasoned District Court opinion in the case of *United States v. Bay Area Painters & Decorators Joint Committee*, 49 Fed. Supp. 733, Judge St. Sure of the District Court for the Northern District of California, Southern Division, said:

“From this language it is reasonable to infer that where a union *does* combine with non-labor groups the end to which its activities have been the means should be considered. It is easy to see



the widespread evils that could result if employers were permitted to join with the unions in all activities exempted by the Clayton and Norris-LaGuardia Acts. Industry within the State could by direct means virtually eliminate competition with other states. But where the demands of the union for certain 'terms and conditions of employment', considered apart from their activities in obtaining them, appear reasonable, an acceptance thereof by the employers should not render them unreasonable and unlawful, even though indirectly a restraint on interstate commerce may result, so long as such restraint is not the direct intent of the agreement."

Among the early cases decided by the Supreme Court under the Anti-Trust law is *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290, in which the Supreme Court held that an agreement with respect to services, which agreement might indirectly affect commerce, is not within the scope of the anti-trust law. At the same time, the Court decided the case of *Anderson v. United States*, 171 U. S. 604, 615-16, 43 L. Ed. 300, 306, wherein the Court ruled to the same effect, saying, in this connection:

"Where the subject-matter of the agreement does not directly relate to and act upon and embrace interstate commerce, and where the undisputed facts clearly show that the purpose of the agreement was not to regulate, obstruct, or restrain that commerce, but that it was entered into with the object of properly and fairly regulating the transaction of the business in which the parties to the agreement were engaged, such agreement will be upheld as not within the statute, where

it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but indirect and incidental, and not its purpose or object.”

See also *Levering & G. Co. v. Morrin*, 289 U. S. 103, 77 L. Ed. 1062.

Upon the basis of the foregoing authorities, it is submitted that the Court erred in its instructions on this point.

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**F. THE COURT ERRED IN INSTRUCTING THE JURY THAT IF THE ALLEGATIONS OF THE INDICTMENT ARE TRUE, THE DEFENDANTS ARE TO BE FOUND GUILTY.**

**1. The instructions given.**

The Court instructed the jury as follows:

“If the Government proves beyond a reasonable doubt that the defendants or any two or more of them combined and conspired to restrain interstate or foreign trade and commerce in fresh fish, as alleged in paragraph 12 of the indictment (which was paragraph I paraphrased to you a while ago), any defendants who you may find were members of or participants in such a conspiracy would be guilty as charged in the indictment.” (Tr. 1937.)

The defendants objected as follows:

“We object on the following grounds, that the indictment does not state a cause of action and

that therefore proof of the facts set forth in the indictment are not sufficient for any purpose. And, second, that even if the facts alleged in the indictment are proved it doesn't allow for the establishment of defenses such as the defendants were operating under the Fishermen's Marketing Act and exempt under the Clayton Act, and subject to the interpretation that if the government proves the facts set forth in the indictment that then the defense of the Fishermen's Marketing Act, and the defense of the Clayton Act and the defense of the rule of reason will not apply." (Tr. 1787.)

**2. The instruction given was erroneous.**

It appears that on the face of the indictment that the subject matter thereof is a combination of fishermen, who, as working original producers, combined for the purpose of fixing the price of the products of their own labor. Because original producers are not covered by the Sherman Anti-Trust Act and because they are exempted by the terms of Section 6 of the Clayton Act and by the Fishermen's Marketing Act, such a combination does not constitute a restraint of trade in violation of the Sherman Anti-Trust Act. Defendants' contentions in this regard have been fully covered above.

G. THE COURT ERRED IN INSTRUCTING THE JURY  
CONCERNING PICKETING AND BOYCOTTING.

See Appendix V, pages 78-79, for instruction given by the Court.

The italicized portions of the instruction are erroneous and prejudicial. Appropriate objections were made by appellants. (Tr. 1829, *et seq.*) In the context of the present case those instructions contributed to a miscarriage of justice.

In addition to the erroneous instructions above specified, error is assigned for the refusal of the Court to give the instructions set forth in Appendix W, pages 80-81, all of which were proposed by the defendants and which deal with the same subject matter.

It is argued elsewhere in this brief that the Fishermen's Cooperative Marketing Act should have compelled a direction to acquit. The Court did in fact read some of that statute to the jury. (Tr. 1940, *et seq.*) Furthermore, as is seen by the foregoing, the Court told the jury that picketing and boycotting were not "contrary to or in violation of any law." Yet somehow, the combination of these two lawful classes of conduct,—cooperative marketing and picketing,—became illicit and criminal.

First, it is plain that the Sherman Act was not designed to prevent disruptions of interstate commerce by picketing, boycotting, or even by violence. Since the time of the extended discussion of this question in the *Apex* case, it has been unnecessary to argue this point. *Apex Hosiery v. Leader*, 84 L. Ed.

1311, 310 U. S. 469; *United Leather Workers*, etc. case, 265 U. S. 457, 68 L. Ed. 1104, 33 A.L.R. 566; *First Coronado Coal* case, 259 U. S. 344, 66 L. Ed. 975.

In the present case it is important to point out that the foregoing rule was not to be construed as an exemption in favor of labor, or an exemption due to the character of the defendant. The fact is that such conduct was held not to be a violation of the Sherman Act, regardless of who was the actor.

“These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act. Underlying and implicit in all of them is recognition that the Sherman Act was not enacted to police interstate transportation, or to afford a remedy for wrongs which are actionable under state law, and result from combinations and conspiracies which fall short, both in their purpose and effect, of any form of market control of a commodity, such as to ‘monopolize the supply, control its price, or discriminate between its would-be purchasers.’ These elements of restraint of trade, found to be present in the Second Coronado Coal Co. case and alone to distinguish it from the First Coronado Coal Co. case and the United Leather Workers International Union case, are wholly lacking here. We do not hold that conspiracies to obstruct or prevent transportation in interstate commerce can in no circumstances be violations of the Sherman Act. Apart from the Clayton Act it makes no distinction between labor and non-labor cases. We only hold now, as we have previously held both in

labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market on which the Court relied to establish violation in the Second Coronado Coal Co. case. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the Appalachian Coals case and in others on which it relied." (pp. 1333-4.)

In the instant case, however, the trial Court instructed the jury that contracts obtained by means not peaceful constituted violations of the Sherman Act, because of the manner in which they were obtained. This was erroneous.

In the *Apex* case it was said:

"The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because without other differences, they are attended by violence." (p. 1334.)

Although, it is submitted, the question has been settled by the *Apex* case, it is interesting to reflect on

the consequences of the Court's instruction. The meaning of the instruction given is that the law of duress in commercial contracts is imported into the Sherman Act, and a contract otherwise valid constitutes a violation of the Sherman Act if it is obtained by means of picketing. The result of such a theory would be that every contract in interstate commerce which one of the parties claims to have been procured by any means which vitiates consent is a criminal act and is subject to prosecution by the United States government. Fortunately such a theory cannot survive the opinion in the *Apex* case which made clear that the importation of violence into a transaction otherwise not in restraint of trade did not constitute a violation of the Sherman Act.

A great deal of evidence was received (over the defendants' objections) concerning picketing and the other activities of the defendants in their effort to get a contract with the dealers (the propriety of the admission of this evidence is argued elsewhere). As is shown in the statement of facts the evidence concerning picketing was detailed and repetitious. There was even evidence of the effect of the picketing on dealers, shipping agencies, and other fishermen. In fact the transcript reveals that the trial was conducted as though one of the principal issues was the conduct of the defendants in picketing and trying to get the contract. The Court's instruction that a co-operative marketing agreement, otherwise lawful, was a violation of the Sherman Act therefore could only have been understood by the jury as an instruction dealing with a critical phase of the case.

The error of the Court is not mitigated by the language of the instruction pointing out that picketing and boycotting are not unlawful. The exculpation is clouded by the Court's telling the jury in the next sentence that picketing and boycotting may nevertheless be considered as evidence of whether the defendants "did or did not combine or conspire *as alleged in the indictment*". This immediately reinstates the criminal character of picketing and boycotting. But in any event, the Court's statement that picketing and boycotting are not unlawful, in the context of the present case, creates a direct ambiguity which no analysis or ratiocination can dispel. If the conduct of the fishermen in collectively fixing a price was lawful, and if picketing and boycotting were not unlawful, then here were a lawful means and a lawful purpose. If that is true, what was meant by instructing the jury that a price fixing contract not voluntarily entered into was a violation of the Sherman Act?

It is settled law that where conflicting instructions are given as to a material issue in the case, this is prejudicial error. (*Notary v. U. S.*, 16 F. (2d) 434, 49 A.L.R. 1446 (CCA 8th 1926); *Sunderland v. U. S.*, 19 F. (2d) 202, 215 (CCA 8th 1927); *Nicola v. U. S.*, 72 F. (2d) 780 (CCA 3rd 1934); *American Medical Assn. v. U. S.*, 130 F. (2d) 233 (CCA DC 1942); *Thomas v. U. S.*, 151 F. (2d) 183 (CCA 6th 1945).)

The instruction in the *Notary* case, *supra*, was subject to the same defect. It read as follows:

"Now, as I have said before, no liquor was sold, no liquor was kept, on these premises. So



the sole question for you to decide is whether, first, these defendants maintained a place where liquor was kept for an unlawful purpose, as the statute defines it (and any customer who brought liquor in there and drank it on the premises was committing an unlawful act); and, secondly, whether either of these defendants actively within the meaning of that statute directed, aided and abetted or counseled or induced them to violate the law. If they did, they are guilty. If they did not, they are not guilty." (p. 438.)

The reviewing Court held the instruction erroneous and reversed the case. It is apparent that the conflict was between the statement that no liquor was kept on the premises, and the submission of an issue to the jury to determine whether liquor was kept for an unlawful purpose. The similarity to the case at bar seems plain. The instruction that picketing and boycotting are not unlawful coupled with the instruction that a marketing agreement which was not voluntary constituted a restraint of trade was so conflicting as to require reversal.

In the *Nicola* case, *supra*, the Court said:

"Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. When an erroneous instruction has been given, it is not cured by a subsequent correct one, unless the former is withdrawn." (Citing numerous cases.)

*Id.* 787.

## H. THE COURT ERRED IN ADMITTING EVIDENCE ON PICKETING AND BOYCOTTING.

So much evidence was received concerning picketing and boycotting by the defendants that it is impractical to set it all out here. See Appendix X, pages 82-86, for illustrations of such evidence and of the nature of the objections introduced.

This evidence (together with the instruction given by the Court concerning involuntary agreements with a fishermen's cooperative) indicates that the case was tried on an erroneous theory, notwithstanding the objections of the defendants. In view of the undisputed evidence of concerted action by the defendants, through Local 36, evidence of picketing activity cannot be justified on the ground that it showed a combination. It was offered and received on the theory that the manner in which the contract under the Fishermen's Cooperative Marketing Act was sought determined whether it was in restraint of trade. (See argument made under the heading "The Court erred in instructing the jury concerning the Fishermen's Cooperative Marketing Act and concerning picketing and boycotting.")

That this evidence was prejudicial is manifest. The agreement sought by the fishermen was not unlawful; the Court gave an instruction concerning the propriety of joint action by fishermen under the Fishermen's Cooperative Marketing Act. But, as is elsewhere argued, the Court instructed the jury that if such agreements were not entered into voluntarily they constituted a violation of the Sherman Act. The evi-

dence of picketing and boycotting could therefore only have been understood by the jury as evidence showing a conspiracy by the fishermen to get an agreement from the dealers which would not be wholly voluntary; and that evidence could only have been understood as showing a violation of the Sherman Act.

It is submitted that the admission of this evidence over defendants' objections necessitates a reversal.

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## II.

### **THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE OFFERED BY THE APPELLANTS. (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 8. Tr. 2581.)**

#### **A. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE APPLICABILITY OF THE FISHERMEN'S MARKETING ACT.**

##### **1. The rejected evidence.**

After the Court had indicated its position with regard to the admissibility of certain kinds of evidence offered by the defendants, the defendants were allowed to make offers of proof as though the witnesses were on the stand and as though the appropriate questions to lay the foundations for the offer of proof had been asked and objections thereto sustained. One such offer was rejected by the Court on the grounds of immateriality and remoteness and that the evidence offered was self-serving and didn't tend to prove or disprove any issue in the case. (Tr.

1423.) This offer of proof was presented on April 21, 1947, Exhibit TT,<sup>1</sup> and in it the defendants offered to prove through the witness Kibre the following:

In 1942, Local 36 carried on marketing experiments regarding the canning of barracuda and for the purpose of these experiments the members of Local 36 accepted lower prices than otherwise would have been obtained. (Exhibit TT, page 17.)

Under date of April 26, 1947, the defendants submitted a written offer of proof (Exhibit GG-1), in which they offered to prove certain matters through John B. Schneider, testifying as an expert in economics specializing in agricultural marketing and as a marketing and economic consultant. An objection was sustained on the grounds that the offer was incompetent, irrelevant and immaterial. (Tr. 1688-91)<sup>2</sup>. Through this witness the defendants offered to prove (a) the fisherman is in the same position economically as a farmer (Exhibit GG-1, pages 2-3); (b) collective bargaining associations among farmers are common and there are a large number of such associations in California, some of which are specifically named in the offer of proof. The functioning of such associations has established as a matter of practice that they do not result in those evils which usually flow from monopolies. (Exhibit GG-1, pages 13-15.)

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<sup>1</sup>For purposes of convenience, this offer of proof will hereinafter be referred to as the General Offer of Proof.

<sup>2</sup>For purposes of convenience, this offer of proof will hereinafter be referred to as the Schneider offer of proof.

## 2. Admissibility of the offered evidence.

The rejected evidence was material in that it showed first, that Local 36 conducted activities relating to the marketing process, and second, that collective bargaining associations constitute an established and recognized form of collective marketing organization, accomplishing objectives similar to those of other forms of collective marketing associations.

The evidence offered was apparently rejected because of the Court's theory that the Fishermen's Marketing Act does not apply to organizations which merely bargain collectively for their members. That this is not the law has been fully argued above.

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## B. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE APPLICABILITY OF SECTION 6 OF THE CLAYTON ACT.

### 1. The rejected evidence.

a. The Court refused to permit the introduction of Exhibit O, a letter of June 5, 1944, from Local 36 to all Southern California fish dealers, outlining in detail the purposes and intentions of the union and inviting the dealers to a meeting to discuss the much needed stabilization program. Defendants offered this for the purpose of establishing the kind of an organization Local 36 was, but the offer was rejected as immaterial. (Tr. 1294-5.) See Appendix Y, page 87, for the proceedings as they related to defendants' Exhibit O for identification.

b. The document entitled "A Message to All Market Fishermen", which was circulated among fishermen for the Southern California area about June 12, 1946, by Defendant Local 36 was marked Exhibit P for identification, and was likewise offered to show the character of the organization. Objection was sustained on the ground that the document was immaterial and self-serving. (Tr. 1299-1302.) See Appendix Z, page 88, for excerpts from the record relating to Exhibit P.

c. Marked as Exhibit Q for identification was a letter from defendant Local 36 to all Southern California fish dealers, dated July 10, 1944, asking the dealers to enter into negotiations for an agreement relative to the price and conditions of delivery of fresh fish. The objection to the introduction of this letter was sustained. (Tr. 1304-5.) See Appendix AA, page 89, for excerpts from the record relating to Exhibit Q for identification.

d. Exhibit X and X-1 for identification are copies of National War Labor Board award treating prices paid to fishermen as wages. An objection to these documents on the grounds that they were incompetent, irrelevant and immaterial was sustained. (Tr. 1360-1.) See Appendix BB, page 90, for excerpts from record relating to Exhibit X and X-1 for identification.

e. In the general offer of proof, Exhibit TT, defendants offered to prove through the witness Kibre, the following: The organization of fishermen on the

Pacific Coast on a labor union basis has a long history going back at least to 1886 (Details given in offer of proof) in which period of organization there have been many strikes and related activities for the purpose of achieving minimum price agreements. Continuously since 1900, up to and including the present time, numerous minimum price agreements have been negotiated and placed in effect in various areas of the Pacific Coast. Copies of some of such agreements were marked as Exhibits A-1 to A-129, inclusive, and were included in the offer of proof. All of such agreements were entered into between working fishermen, including boat owners, and buyers of fish. In various disputes with relation to such minimum price agreements, the U. S. Conciliation Service of the Department of Labor has participated through its representatives in negotiations. Exhibit A-131, for identification, which was part of the offer of proof set forth the facts concerning one such negotiation meeting. At times the Maritime Conciliation Service was also used in negotiations. During the war, the National War Labor Board in more than 12 cases set the prices of fish as constituting the wages of fishermen. (Exhibit TT, pages 4-15.)

f. The Schneider offer of proof included the following: A fisherman is a laboring producer as distinguished from a capitalist or entrepreneur. Because of his economic weaknesses as compared with the buyer, the fisherman is in the position of a "selling employee." (Exhibit GG-1, pages 3-4.)

## 2. Materiality of the evidence.

All of the offered evidence tends to establish that historically and from an economic standpoint fishermen have organized to bargain for the price of the fish they catch as a means of having some voice in the amount that they should be paid for the expenditure of their labor. The evidence offered was apparently rejected on the theory that no employer-employee relationship existed and that, therefore, the Clayton Act does not apply. That the evidence and the law require a contrary conclusion has been argued above.

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## C. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUES OF THE APPLICABILITY OF THE RULE OF REASON AND TO THE PROPOSITION THAT ORIGINAL WORKING PRODUCERS ARE NOT PROHIBITED BY THE ANTI-TRUST LAWS FROM COMBINING HORIZONTALLY FOR THE PURPOSE OF FIXING PRICES.

### 1. The rejected evidence.

a. The general offer of proof contained the following proffered through the witness Kibre: (Exhibit TT.) Prior to unionization of fishermen, there was great fluctuation in the prices paid to the fishermen. Such payments were extremely low on the average and shortweighing of fish was a common practice. As a result the fishermen were in a chronic state of economic distress, so great that in many periods there was an absolute inability to maintain subsistence earnings, such earnings falling as low as an average of \$300 a year. (Exhibit TT, pages 1-4.)



For many years, there has been in effect a Fish and Game regulation requiring that fishermen obtain a secured market before going fishing. Where collective bargaining agreements exist, this rule has been complied with. Elsewhere, including the Southern California area, compliance with this rule has been impossible for fishermen engaged in market fishing because in the absence of a collective bargaining agreement, the dealers simply refuse to give advance orders. (Exhibit TT, page 11.)

Where collective bargaining agreements have existed there have been great increases in the harvesting of fish. Where there have been none, there has been no such increase. (Exhibit TT, pages 15-16.)

At a time in May of 1947, when the price of barracuda dropped from 20¢ to 6¢ per pound to the fisherman, the retail price remained constant at 55¢ to 65¢ with inadequate supplies in the market. As a result of a conference initiated by the Fishermen's Union, the price to fishermen was raised to 10 to 12¢ a pound and the price to consumer was simultaneously reduced to 38 to 40¢ per pound. (Exhibit GG, pages 16-17.)

b. In the general offer of proof, defendants proffered testimony of a number of market fish dealers that a much larger quantity of fish in terms both of pounds and dollar value comes in from areas outside Southern California than is caught in that area. (Exhibit TT, pages 17-19.)

At any given time, each of the dealers in the various Southern California ports pays the same price to the fisherman. Any change in price takes place simultaneously among the dealers in each port. The prices to fishermen drop as much as 500% in a single day with increases never occurring in jumps of more than one or two cents a pound. The prices paid fishermen bear no relationship to the amount charged by the fish dealer. (Exhibit TT, pages 19-21.)

c. In the Schneider offer of proof appears the following: It is a basic principle of economics that joint action on the part of primary producers of a seasonal and perishable product, to improve prices to the producers is beneficial rather than harmful to consumers. (Exhibit GG-1, page 2.) The fisherman is in the same economic position as the farmer. He is in an economically weak bargaining position as compared with the buyer. The fisherman is in a particularly difficult position with respect to his inability to hold his product for a fair price and is constantly forced to sell under conditions of forced sale. (Exhibit GG-1, pages 3-5, 9-10.)<sup>3</sup>

The fisherman is subjected to the natural processing factors over which he has no control whatsoever. (Exhibit GG-1, pages 4-5.)

The dealer, as distinguished from the fisherman, is an entrepreneur who primarily is investing his money in hope of making a profit. (Exhibit GG-1,

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<sup>3</sup>Regarding inability of fishermen to sell fish, see also Offer of Proof, Tr. 1716-17, giving details thereof.

page 6.) The dealer operates on a much larger scale than does the fisherman and because of resulting advantages is not dependent upon any individual fisherman in order to obtain the product. (Exhibit GG-1, pages 6-7.) The dealer, as distinguished from the fisherman, does not have to participate in forced sales because he is in a position to hold the fish for a fair price. (Exhibit GG-1, pages 7-8.)

Market fish competes with all other proteins and its price to the consumer is determined by the price of other proteins. Fish cannot be sold on the consumer market at prices out of line with other protein prices. (Exhibit GG-1, pages 8-9.) When large amounts of fish are caught at any one time, the price to the fisherman goes down, but there is no reduced price to the consumer as a result. The dealer simply stores and holds the fish while maintaining a constant supply on the consumer market. (Exhibit GG-1, pages 10-11.) Increased prices to the producer tend to increase *overall* production, and this has a tendency to reduce prices to consumers. (Exhibit GG-1, pages 11-12.)

Agricultural organizations get governmental help, but fishermen receive none, or practically none. (Exhibit GG-1, page 13.)

d. Defendants also submitted a written offer of proof prepared by the California CIO Council Research Department (Exhibit GG), which was rejected as incompetent, irrelevant and immaterial. (Tr.

1688-91.)<sup>4</sup> In this offer of proof, the following was submitted: The price of fish is determined by factors outside of the control of the men who fish for fresh market fish. The prices paid to the fishermen for approximately one-third of their fresh fish are guided by cannery prices for the same species. Retail prices are determined by the price of fresh fish from other areas. The volume of out of state or Northern California fresh fish far outweigh Southern California fresh fish sold in the Los Angeles market. (Exhibit GG, pages 28-33.)

Fresh market fishermen average between \$628 and \$1022 annually from fresh fish sale. (Exhibit GG, pages 34-6.) In this connection offers of proof of the earnings of the individual defendants were made,—said earnings fitting in with the general pattern set forth above. The share received, by those defendants who owned boats, for the use of the boat has been inadequate to compensate the boat owners for their work in maintaining and repairing the boat upon the same time basis as the compensation received by them as their share for catching the fish. (Exhibit GG, pages 34-6, Tr. 1498-8, 1498-1500, 1663-5, 1265, 1716-20.)

## 2. The Court's rulings were erroneous.

All of the evidence offered dealt with matters which again and again have been recognized as pertinent

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<sup>4</sup>For purposes of convenience, this offer of proof will hereinafter be referred to as the Research Department Offer of Proof.

to the issue of the reasonableness of an agreement alleged to be in restraint of trade. Thus, in the case of *Board of Trade v. U. S.*, 246 U. S. 231, 62 L. Ed. 683, 687, the Court said:

“\* \* \* But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. \* \* \*”

See also:

*Sugar Institute v. United States*, 279 U. S. 553, 571, 80 L. Ed. 854, 862.

The rulings of the trial Court were apparently based upon the Court's theory that the rule of reason does not apply to the facts of this case. That the rule of reason does apply has been fully argued above.

D. THE COURT ERRONEOUSLY REFUSED TO ADMIT EVIDENCE RELEVANT TO THE ISSUE OF THE DIRECT AND SUBSTANTIAL EFFECT UPON COMMERCE OF THE CONSPIRACY CHARGED.

1. The rejected evidence.

a. In the Research Department offer of proof, the following appears: The crews of small boats in Local 36 constitute only a small fraction of the fishermen in the Southern California area; fresh market fish is brought in by many fishermen who are not members of that local. (Exhibit GG, pages 1-8.)

The small boat fishermen (Local 36 is made up entirely of such fishermen) in Southern California number 1437 of whom 747 are members of Local 36. Less than one-third of these fishermen engage regularly in fresh market fishing, and they compete with party boat fishermen and with large boats. (Exhibit GG, pages 9-16.)

The commercial catch of fish in year 1946 was substantially higher in Southern California than the catch in the last ten years and three times as high as the 1942 catch. The amount of landings is determined by such factors as the variable catch of species of cannery fish, such as mackerel and albacore. The fresh market fish catch varies between 1.8% and 3.1% of the total fish landings in the Southern California area. The small fleet catch consists of 87.6% cannery fish and 12.4% fresh fish. (Exhibit GG, pages 17-27.)

b. In the general offer of proof defendants proffered the testimony of various fish dealers to establish that during the month of June, 1946, each of the fresh

fish dealers in Southern California was able to and did buy all of the fish that he desired or could handle. No orders went unfilled because of lack of supply. There was no unfilled demand and there was no change in the normal or usual supply of fish in the Southern California area or in any other area in the five Western states set forth in the indictment. (Exhibit TT, pages 17-18.) See also the testimony of Alexander Waissbord, and Brigham Grastieg. (Tr. 457-65, 473-9) which was stricken and then rejected when submitted as an offer of proof. (Exhibit TT, page 19.)

## 2. The Court's rulings were erroneous.

The evidence offered related directly to the impact of defendants' conduct upon commerce and tended to establish that this case involves merely a local controversy. The Court's rejection of this evidence is submitted to be erroneous even under its own instruction that there must be a conspiracy to restrain commerce in a substantial way. (Tr. 1938.) Defendants' argument on this point has been covered above.

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## III.

**THE DISTRICT COURT ERRED IN GRANTING THE MOTION MADE BY CERTAIN WITNESSES ON APRIL 18, 1947 TO QUASH SUBPOENA DUCES TECUM.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 11, Tr. p. 2581.)

The defendants subpoenaed the records of fish dealers. The subpoenas were quashed on the grounds that the evidence to be adduced from the records was

immaterial, and thereafter offers of proof were made which are fully discussed under II, C, 1, b, pages 137-138 above and II, D, 1, b, pages 142-143. (Tr. 860-4, 1289-90, 1423.)

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#### IV.

##### **THE DISTRICT COURT ERRED IN ADMITTING EVIDENCE OFFERED BY THE APPELLEE.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 7, Tr. p. 2581.)

##### **A. THE DISTRICT COURT ERRED IN ADMITTING SUMMARIES OF CERTAIN ITEMS IN BOOKS OF ACCOUNTS WITHOUT PERMITTING ADEQUATE INSPECTION BY THE DEFENDANTS OF ORIGINAL RECORDS IN ONE INSTANCE AND ANY INSPECTION OF THE ORIGINAL RECORDS IN OTHERS.**

The witness Ross testified from a summary of certain portions of books of account (Government Exhibit 6) concerning the volume of fish handled by him as a fish dealer. This evidence was admitted subject to the right of the defendants to examine the original books. (Tr. 175-84, 187-9.) These books were produced at the office of the Anti-Trust Division and the representative of that division refused to permit defense counsel to continue with examination of the books because he disapproved of the method of examination. It was the contention of the prosecution that the only right which defense counsel had was to check the books to see if the addition of the figures contained in the summary was correct. The defense, on the other hand, contended (1) that they had the right to examine the books for all purposes, and (2) that even for the purpose of checking the accuracy of the records there are other methods besides simple addi-



tion which they wished to pursue. Although the only opportunity to examine the books lasted for about one hour—to check a summary which had taken several days to prepare—the Court refused to allow further inspection of the books and denied defense counsel's motion to strike Government's Exhibit 6 and all evidence based thereon. (Tr. 294-309.) See Appendix CC, pages 91-96, for colloquy between the Court and counsel on this subject.

In other instances the Court over objections, permitted summaries of, or parol evidence, concerning the contents of books of account without allowing any opportunity to examine the original books upon which the summaries or parol evidence were based despite demands for such examination. (Tr. 324-6, 385-93, 860-4.)

The law on this subject appears to be so elementary and universally recognized that reference to *Corpus Juris Secundum* as authority should suffice. Thus, it is stated that in the case of voluminous records, summaries are admissible "provided, the books, papers, or records themselves are properly in evidence, or the person objecting thereto has an opportunity to examine them." 32 C.J.S. 714-15. This is obviously a rule of convenience—not one intended to deprive parties of rights which they would have had if the original records had been introduced. The rule with respect to the purposes for which books and records may be introduced has been stated as follows:

"A book or document offered in evidence, including public documents and records, as well

as private documents and writings, must as a general rule be considered in its entirety, the parts operating against the interest of the party offering it as well as the parts in his favor. \* \* \*

Documentary evidence properly admitted in a case, regardless of by whom it was introduced, may, as a general rule, be weighed and considered for or against either party, and, although it is introduced to prove a particular fact, or for a particular purpose, it becomes substantive evidence in the cause and may be used by the adverse party for other purposes; but this rule does not apply to a writing used merely to refresh the memory of a witness." 32 C.J.S. 700.

Thus, it has been held that summaries of voluminous records are admissible in evidence by the prosecution where the original records "were equally open to inspection by the defendant." *U. S. v. Mortimer*, 118 Fed. (2d) 266, 269, certiorari denied 314 U. S. 616, 86 L. Ed. 496.

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## V.

**THE INDICTMENT ON WHICH APPELLANTS WERE CONVICTED DOES NOT STATE A PUBLIC OFFENSE AGAINST THE LAWS OF THE UNITED STATES.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Point 1, Tr. p. 2580.)

From the face of the indictment, plus facts of which the Court may take judicial notice, it appears that the defendants were original working producers falling within the provisions of both the Fishermen's Marketing Act and Section 6 of the Clayton Act. It

follows that it was no violation of the Anti-Trust laws for defendants to enter into horizontal combination for the purpose of fixing the prices of their product, representing essentially the return for the expenditure of their labor. The argument with respect to these matters has been covered above.

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## VI.

**THE VERDICT AND FINDINGS OF GUILT ARE CONTRARY TO LAW; THE VERDICT AND FINDINGS OF GUILT ARE CONTRARY TO THE EVIDENCE, AND THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT;**

**THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION FOR ACQUITTAL AT THE CONCLUSION OF THE GOVERNMENT'S CASE AND AT THE CONCLUSION OF ALL OF THE EVIDENCE;**

**THE DISTRICT COURT ERRED IN DENYING THE MOTION OF THE ABOVE NAMED APPELLANTS TO STRIKE ALL EXHIBITS AND TESTIMONY;**

**THE DISTRICT COURT ERRED IN DENYING THE MOTION OF THE ABOVE NAMED APPELLANTS IN ARREST OF JUDGMENT;**

**THE DISTRICT COURT ERRED IN OVERRULING APPELLANTS' MOTION FOR A NEW TRIAL.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Points 2, 3, 6, 10, 12 and 13, Tr. pp. 2580-2.)

The evidence establishes that defendants are original working producers, that they have organized into an association which meets the requirements of both the Fishermen's Marketing Act and Section 6 of the Clayton Act, that they are engaged essentially in the selling of services, and in seeking an adequate return for the expenditure of human labor, and that

the agreements which they sought to obtain were reasonable ones within the meaning of the rule of reason as applied to the Anti-Trust law. It therefore follows that the trial Court erred in each of the respects set forth above. The arguments on all of these points have been set forth fully above.

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## VII.

**THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS BASED ON THE GROUND THAT THE GRAND JURY WHICH RETURNED THE INDICTMENT WAS IMPROPERLY SELECTED, AND IN DENYING THE CHALLENGE TO AND MOTION TO STRIKE OUT THE ENTIRE TRIAL JURY PANEL.** (Statement of Points Upon Which Appellants Intend to Rely on Appeal, Points 4 and 5, Tr. p. 2581.)

### A. THE ISSUES.

At the appropriate time the appellants, the defendants below, hereinafter referred to as the defendants, filed a notice of motion to dismiss the indictment and of challenge to and motion to strike out the entire trial jury panel. The motion recited that the grand jury which returned the indictment was improperly selected "in that the said Grand Jury was drawn in such a manner that it was not an impartial Grand Jury drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally discriminated against \* \* \*" and that defendants fall within the classes of

persons so excluded. That same discrimination was charged with relation to the selection of the trial jury panel. (Tr. 25-28.)

Testimony was produced by the defendants in support of the motion and at the conclusion of said testimony and prior to resting, the defendants moved to amend the motion to conform to proof by the addition of specific allegations of discrimination with respect to "operatives and kindred workers, domestic workers, service workers," and "Americans of Mexican descent" as well as discrimination in favor of "proprietors, managers and officials." (Tr. 2497-2502.) The motion was denied by the trial Court on the ground that the original motion was probably broad enough to frame the issues as set forth in the proposed amendment. (Tr. 2501.)

The motions to dismiss the indictment and to strike the jury panel were denied. (Tr. 2573.) Thereafter, a jury was selected; the defendants exhausted the peremptory challenges allowed by the Court and requested additional challenges, which request was denied. (Tr. 2574-8.)

The issues presented here are: (1) Is a jury panel properly selected when the method used for the selection of the prospective jurors is such that it *necessarily* leads to discrimination against certain groups in the community and, therefore, by reason of the system used results in the selection of an unrepresentative jury panel not constituting a cross-section of the community?

(2) Is a jury panel subject to attack on the grounds that its composition varies from a representative cross-section of the community to such an extent that the departure from such representativeness cannot be accounted for by chance alone but must be the result either of the system used or of deliberate purposeful discrimination?

(3) Does the evidence herein establish either the use of a system in selection of prospective jurors which system necessarily leads to discrimination, or a resulting selection so unrepresentative of the community as to indicate that it could not have been due to chance alone?

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#### **B. THE FACTS.**

##### **1. The method of selecting prospective jurors as shown by the evidence.**

It should be noted first of all that purposeful discrimination, that is, any intentional motivated discrimination, is denied by those persons charged with the responsibility of selecting prospective jurors. (Tr. 2088-9, 2171-2.)

Names for persons to be brought in for jury service are selected in the first instance primarily by the jury commissioner with the clerk of the Court furnishing some few lists of names. (Tr. 1986-7.) From time to time the jury commissioner brings in lists containing widely varying numbers of names, and gives them to the clerk of the Court. (Tr. 2028, 2037.) There is no uniform system of obtaining lists. (Tr.

2099.) The present jury commissioner has, during his 16-year term of office, turned in to the clerk somewhere between 20,000 and 24,000 names. (Tr. 2158.) During the period from 1943 to the time of trial the jury commissioner turned into the clerk lists of names from the following sources:

(1) *The Southwest Blue Book (Exhibit U)*, to which the Commissioner's wife was a subscriber (Tr. 2160). The Southwest Blue Book is a social register (Tr. 2129), the preface of which reads as follows:

"With an unbroken record of 43 annual editions as its background, the Southwest Blue Book for 1947 adds still another to the long series. We believe the 1947 issue will sustain this publication's reputation as the standard society register of Southern California, the book having been carefully revised and brought down to date. The listing [250] of many eligible newcomers has augmented the already large roster of older first families; there are special sections devoted to the year's marriages, clubs and other features while an unusually large number of address and telephone changes will be noted. The editor wishes to thank her many patrons for ready co-operation which has greatly lengthened the work of compiling."

On May 17, 1945, the jury commissioner turned in 1680 names from this source. He testified that there was no particular reason for the use of the Southwest Blue Book except that he had to select some source from which to obtain names and that this seemed to be a good one. (Tr. 2147.)

(2) *The Ebell Club, a woman's club*, was the source of a list of 58 names on March 16, 1944. (Tr. 2137.)

(3) *The Friday Morning Club, another woman's club*, furnished the jury commissioner a list of 27 women upon his request, which list he turned into the clerk on March 27, 1944. (Tr. 2124, 2128, 2144.)

(4) *The telephone book* was the source of a total of 3878 names, turned over to the clerk in six separate lists during this period. (Tr. 2138, 2141, 2143, 2148, 2149.) The jury commissioner selected names from the telephone book by opening a page and picking out names at random. He stated that he had no systematic method of selection and that he paid no attention to names or nationalities. (Tr. 2139.)

(5) *A list of registered owners of automobiles in the Los Angeles area obtained from a friend, who in turn got that list from some company which prepared such lists for sale.* It was the understanding of the jury commissioner that the list was made up for insurance companies who wanted to solicit insurance from car owners. (Tr. 2122-3.) On May 7, 1945, a list of 1000 names secured from the said automobile list and the telephone directory was turned into the clerk. The commissioner did not know how many of the 1000 names came from each of the two sources. (Tr. 2145.)

(6) The names of 69 women were obtained from the *Congress of Parent and Teachers* on May 17, 1945.



Mr. Ivan H. Brown, the jury commissioner, held that office for approximately 16 years. Although he did not have available copies of lists turned over to the clerk of the Court prior to 1943, he testified that his method of selecting names during the period from 1943 to 1947 was typical for the entire period of 16 years. (Tr. 2159-60.) Certain other specific sources which have been used by the jury commissioner were mentioned by him. They were:

(1) *The Los Angeles Country Club, a golf and country club.* (Tr. 2126.)

(2) *The University Club.* (Tr. 2126.)

(3) *The California Club, a social club* in which manual workers, if any, were in the great minority. (Tr. 2126-7.)

(4) A very few names from the *Railroad Brotherhoods*, no names being obtained from any other unions. (Tr. 2130-1, 2161.)

(5) *Personal property assessment lists*, the jury commissioner not recalling the exact nature of the lists or how many names were obtained therefrom. (Tr. 2150.)

(6) A small list of *colored people* obtained from a colored minister whom the jury commissioner told he wanted a list of colored persons to serve on juries. (Tr. 2150-1.)

(7) A list of 24 names of *Japanese* obtained from a Japanese minister. (Tr. 2152, 2164.)

(8) A list of *tellers and employees of a bank.* (Tr. 2494.)

The jury commissioner testified that he never obtained a list from a Catholic priest in any area in which a large number of Mexican-Americans reside; that he doesn't know a Mexican or Negro organization from which he could get lists. (Tr. 2151-2.)

When it was pointed out that no Spanish, Mexican or Italian names appeared on the lists obtained from the telephone book, the jury commissioner said that he might have given consideration to the type of names at the time that he made his selection, but that he didn't do it consciously. (Tr. 2155.)

The names so selected by the jury commissioner, as well as a few names selected by the clerk of the Court, are used over and over again in the following way: Jurors who have served, or have been excused from service, have their names kept on cards in a file which now contains cards listing 25,000 to 30,000 persons. (Tr. 1996-7.) Only those who are disqualified for incompetency, for example for such a cause as deafness, do not have their names kept in the file. (Tr. 2026.) The files have accumulated since before 1925, with cards added each years since the inauguration of the system. (Tr. 2027-8.) Names are removed from this file only if it is discovered that the person has become incompetent, disqualified, has died or has moved away from the district, or in the event that the person is otherwise permanently excused. (Tr. 2028, 2034.)

From time to time the clerk of the Court sends out questionnaires to prospective jurors, obtaining the names of the persons to whom the questionnaires are

sent from two sources—some from original lists submitted by the jury commissioner. (Tr. 2041-3), and some selected at random from those of the 25,000 or 30,000 in the files who have not served during the past three to five years. (Tr. 1996-7.) There is no particular system with respect to the number of names selected from these two sources; the clerk merely takes some from each. (Tr. 2043.)

In 1944 or 1945, 5000 to 6000 questionnaires were sent out and about 1800 were returned. (Tr. 1998.) From 25% to 33 $\frac{1}{3}$ % of the questionnaires sent out are returned on the average. (Tr. 2114.) Nothing is done with respect to questionnaires which are not returned. Thus, the appearance of prospective jurors is rendered entirely dependent upon the voluntary act of the individuals involved. (Tr. 2102.)

When the questionnaires are returned, they are placed in alphabetical order and cards are typed therefrom. From these cards tickets are typed with just the name of the juror thereon, and said tickets are placed in the master jury box. Thereafter, names are drawn from the master jury box for various panels for both petit and grand juries. (Tr. 1968-9, 2053.) Whenever the number of names in the master jury box falls below 300, the matter is called to the attention of the senior judge who then orders additional names placed in the box. (Tr. 1980.)

The names for the grand jury panels are drawn from the master jury box twice a year, that is, a month before the commencement of each term. (Tr. 1970.) The panel for the grand jury which returned

the indictment herein was drawn in December 1945 and the jury was impanelled February 1946. In December, 50 names were drawn and typed on a venire, which was issued to the marshal and the persons were thus ordered to appear in Court. (Tr. 1970-1.)

The names from which the petit jury panel in this case were drawn were selected on January 2, 1947. At that time 855 names were placed in the master jury box from which names four jury panels were later drawn. (Tr. 1978-9.)<sup>1</sup> The first drawing of panels from the master box was on January 3 when two separate venires of petit juries and one grand jury were drawn. The trial jury in the instant case was selected from a panel or panels drawn later, but originating from the same 855 placed in the master box on January 2, 1947. (Tr. 1988.) There is no way of ascertaining how many of the 855 names came through original lists submitted by the jury commissioner and how many came from old records. (Tr. 2056.) Some indication of the division may be drawn from the following facts: In 1946 a petit jury of 293 persons contained 172 who had no previous jury service and 121 who had. However, the 172 undoubtedly included an undisclosed number drawn from the old files who had been excused and therefore had not previously served. (Tr. 2117.) The fact is that 50% or more of the jurors called for service are excused and their names go into the permanent records along with the names of those who serve.

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<sup>1</sup>Of the 855 names placed in the box, only 822 of the questionnaires were available. The other 33 were missing from the file. (Tr. 2025.)

When the prospective jurors appear in Court some are excused or found incompetent for service. Examples were given where out of 200 names drawn 70 were finally impanelled. (Tr. 1989.)

The practice hereinabove set forth has been in effect during the entire 16 years of service of the present jury commissioner, and before (Tr. 2097-8), except as follows:

1. Questionnaires were not used until 1943, following the conference of Senior Circuit Judges. (Tr. 1975.)

2. More names were drawn for panels during the war because there were a greater number of excuses. (Tr. 1974.)

3. The first names of women were placed in the box in the latter part of 1943 for the 1944 term. (Tr. 2030.)

Thus it appears that prospective jurors are selected, first, from lists submitted by the jury commissioner, which lists he obtained from the telephone book and certain special sources as above set forth, and, second, from a card file of names maintained continuously over a period of considerably more than twenty years, which names were obtained in the first instance from the lists submitted by the jury commissioner.

**2. Expert testimony analyzing the composition of the juries and establishing the grossly unrepresentative character of the method of selection and of the results thereof.**

The defense called as their principal witness Mr. William S. Robinson, an outstanding statistician in the field of social research, an assistant professor of sociology at the University of California of Los Angeles, with an M. A. in sociology and a Ph. D. in sociology and statistics. (For Mr. Robinson's qualifications, see Appendix DD, pp. 97-98.)

Dr. Robinson explained how a cross-section of the community, a "random sample" as it is called, is obtained for statistical purposes. The word "random," used herein, does not refer to selection without conscious bias; rather, it means picking mechanically so that there is no possibility of bias, conscious or unconscious. A sample selected by a random method is a group of cases or observations taken from a much larger group of cases or observations about which it is desired to know something. For example, Mr. Roper is able, by taking a random sample of 5000 persons, to predict accurately how the voting population of the United States, consisting of some forty million, will vote. A sample has to be selected so that it can make forecasts of that sort reliable, and in order to accomplish this the sample must be representative of the community. In picking a sample from a population the attempt is made to eliminate the human element. It is a fact that no one can make selections unless some mechanical means is adopted. The best of all accepted procedure is to use the table of random numbers, which is a table of digits which

have been checked in various ways to show that they are random already. Other ways, such as the proper throwing of dice, or mechanical selection of numbers are also acceptable. (Tr. 2182-6.)

The selection of samples or cross-sections by the random method does not result in exact cross-sections being obtained. As a matter of fact, the variation from an exact cross-section will vary from sample to sample. However, it is possible to set limits within which the variation will lie. These limits can be computed definitely and mathematically, provided that a true random method is used. (Tr. 2271-4.)

An example given by Dr. Robinson was one which assumed a drum containing a large number of marbles, 10% of which were white, and 90% black. These marbles are stirred very thoroughly and a sample of any specified number selected, without regard to their color. The proportion of white balls in the samples would not exceed 18% or fall below 2% more often than once in 100,000 times. This having been established, the following is obvious: If marbles are drawn from a drum containing an unknown quantity of white and black marbles, and 72% of the marbles are white, it is just not reasonable to conclude that the drum contains only 10% white marbles. In other words, ascertaining the character of a randomly selected sample, it is possible to determine, within limits, the character of the source from which it is drawn. In the instance where 72% of the marbles drawn are white, the number of white marbles in the drum might vary either 8% above or 8% below 72%,

but would not, as a matter of mathematics, vary beyond either of these two limits. The same principles can be applied to marbles, or squares, or human beings, or automobiles, or anything else. (Tr. 2274-8.)

It is thus that Dr. Robinson describes a cross-section of the community:

“I mean a sample or a group of picked persons in which the proportions of the different occupations and, let’s say, religious or everything else, should be represented, let’s say, within random errors, or let’s say adequately represented, in ordinary terminology. A miniature cross-section in which there may be some discrepancy between the picked group and the group from which it is supposed to be picked, but not glaring, consistent discrepancies, and particularly discrepancies which are persistent in regard to what a statistician would call Chi and which would tend to overemphasize one group and tend to underestimate another group over and over again.” (Tr. 2422-3.)

In this connection, the inquiry was directed to Dr. Robinson as to how it was possible for 23 persons making up a grand jury to constitute a representative cross-section of the community. With respect to this, the witness said:

“Obviously no 23 people can represent so many subcategories, the number of subcategories of different kinds of people which are involved in your lists, I suppose, in the millions, because if you give me nine divisions for religion, let’s say, and four divisions for education—which you didn’t give but which ought to be included—then that



means 36 subdivisions of both properties together. When you get through multiplying nine by four, by the number of categories in each of those major properties which you gave me, you would have a very large number. So it is obvious that 23 people can't be scattered over a million or two or three categories and fit into each one. What is required is not that they should represent but that they should be randomly selected from those categories, the millions, so that each person in each category shall have a chance of being included in any grand jury that is picked. So that the method of picking shall not exclude, shall not make it impossible, for a certain kind of person to get into the grand jury. That is all that is required." (Tr. 2428-9.)

The essential element in a representative cross-section, as described by Dr. Robinson, is as follows:

"To begin with, there is no question of picking, let's say, persons in terms of their specific properties, that is, the method I envision is a method of picking randomly from a total group. Now it may involve controls in that it may involve picking the right proportion of persons from, say, Burbank or other areas—it doesn't matter what they might be—but the essential element to it, which guarantees in the long run the representativeness and the statistics which guarantees the fairness of the sample, is that all persons living or eligible, let's say eligible for jury service, or all members of the population, however you want to define it, shall have a chance to be included, or let's say, that the sample shall be picked at random and that statistically at random

using random numbers or some other device shall be picked from the total group.

In other words, that there shall not be some pigeonholes with covers on the top into which you cannot reach to pick out cases. That is all. That will insure that there will be rich Catholics in the long run in the right proportion, and poor Catholics, many more of them because more Catholics are poor, in the right proportion, and every other possible combination of the millions of combinations of categories or properties in the right proportions." (Tr. 2430-1.)

If a person picks a sample and it is not like the population, that person is biased by reason either of his motives or of the method which he uses. There are no necessary ethical connotations to the bias. (Tr. 2221.)

The studies of the juries involved herein were made in the following manner: Where questionnaires were available, which was in practically all instances, occupational information was obtained directly from them. However, some of the questionnaires did not contain information concerning occupations, and on others the information was not clear. Where that occurred reference was had to the city directory, register of voters, and finally in few instances, if necessary, to personal phone calls to the person involved. From a scientific standpoint these methods are considered reliable for obtaining information. (Tr. 2234.) The only important groups of people for whom information was collected by telephone were housewives and

retired persons. Housewives and retired persons constitute a small percentage of the total involved; in any event, studies of the employed persons alone and of the total group including housewives and retired persons, leads to exactly the same results. (Tr. 2408-9.)

As a basis for comparing the occupational representativeness of the persons selected for possible jury service, the total population as shown by the 1940 census was used. The census classifications are based upon the Edwards Social Economic Grouping of Gainful Workers in the United States, as modified each decade when the census is taken. (Tr. 2227.) The classifications are broken down into a number of major headings, with most of the major headings containing subdivisions, each of which major headings and subdivisions thereof is based upon a definite economic and social status. Thus, the classification "farmer or farm manager", which is a major classification without any subdivision, indicates that the person is either the owner or manager of a farm. It does not indicate whether he runs a big farm or a little farm, but it does indicate that he is not a laborer,—if he were, he would be classified as a laborer. In those situations where a farmer also does laboring work, he would be classified according to his principal occupation. (Tr. 2257-8.)

The fact that different classifications of persons, as set forth in the census classifications, tend to have different economic and social views has been demonstrated by the fortune poll; as, for example, in

February 1944 a poll showing that 65% of professional and semi-professional workers and proprietors, managers and officials believed that labor unions had "gone far enough and ought to be curbed", whereas with respect to the balance of the population only 32 2/10% had this view. This is an example of people in the different economic classes having different social attitudes. (Tr. 2420-1.)

In the study that was made of the jury panels in this case, individuals were classified according to the detailed listings as to the individual classification and they were later grouped into broad classes, that is, the general basic classification utilized by the United States Census Bureau. (Tr. 2238.) One of the basic classifications is professional and semi-professional workers which includes such specific occupations as actors, architects, artists and art teachers, authors, editors and reporters, chemists, assayors, metallurgists, college presidents, professors, instructors and clergymen, and other occupations with the same general characteristics. Another major classification, farmers and farm managers, has already been mentioned. Proprietors, managers and officials include persons who own or have an interest in a business, as well as those who manage a business or a portion of a business, such as production managers, the manager of a firm or of an office, or anyone in a managerial position of authority controlling a large number of other employees. Officials included within this general classification are official representatives of corporations, conductors, postmasters, etc. The

next major classification, clerical, sales and kindred workers, in the main, is composed of clerks, sales people, canvassers and solicitors; in other words, of non-administrative, nonprofessional, nonexecutive white collar workers. The major classification, craftsmen, foremen and kindred workers includes the actual workers and their foremen in such classifications as bakers, blacksmiths, boiler makers, machinists, locomotive firemen, welders, painters, etc. The major classifications, operators and kindred workers, are people who run machines, and apprentices, attendants at filling stations, parking lots and airports, brakemen and switchmen, chauffeurs, truck drivers and firemen, dressmakers and seamstresses, welders and flame-cutters, etc. Essentially, they are people who operate machines or equipment of some sort. (Tr. 2241-7.) The other major classifications are domestic service workers, protective service workers, service workers except protective and domestic, farm laborers and foremen, laborers except farm. Their characteristics are readily apparent in view of the foregoing. Also see Exhibits W-2, et seq.

Housewives and retired persons were tabulated and treated separately to begin with. In addition, housewives were classified according to the occupations of their husbands and retired persons were classified according to their last occupation prior to retirement. It is a scientifically established fact that there is a high correlation between the social and economic attitude of husbands and wives; likewise retired persons generally have the attitude represented by their last

occupation. For the purposes of occupational classification it is a perfectly good method, as research goes, to classify housewives and retired persons in the manner indicated. (Tr. 2248-50.) In any event, the distribution of housewives and retired persons in the occupational series was about the same as the distribution of employed persons; the variation from a representative cross-section did not change to any material degree either by the inclusion or exclusion of housewives and retired persons.

The use of the 1940 Census Bureau figures is proper in this case, because they are biased (in a scientific sense) for the present purpose in over-emphasizing and showing to be more important today than they actually are professional and semiprofessional workers and proprietors, managers and officials, and in underestimating craftsmen and operatives in the main. In other words, their use could mislead only by being too conservative in showing the differences of distribution. The actual differences, that is, the actual variation from cross-section is greater than that shown by the study made in this case. (Tr. 2263-4.)

Insofar as the study made includes persons whose names were selected from the reserve file of 20,000 to 30,000 cards, it does show the general composition of those 25,000 to 30,000 cards because the random selection of several hundred cards from that box would give one a representative cross-section of the cards in the box. (Tr. 2265-6.)

It should also be noted that social, racial and religious classes are very highly correlated with occupational classes. For example, Catholics tend to be in the lower occupational classifications and Protestants in the higher. Likewise, if a sample has a disproportionately large number of high income people, it will have a disproportionately low number of Mexicans, Negroes and foreign born. (Tr. 2452-4.) Occupation is one of the best controlled factors, that is, as a statistical factor, in getting a representative sample. (Tr. 2348-50.)

For the purposes of his study, Dr. Robinson started out by assuming that the population of the county is of the same composition now as it was during the 1940 census an assumption most favorable to the prosecution. Next he accepted the census figures and classifications as a proper basis for determining percentages in various occupations, a procedure demonstrated scientifically to be a proper method of research. Then, he assumed, as a hypothesis to be tested, that each of the groups of jurors and prospective jurors had been drawn at random from a representative cross-section of that population. Finally, he computed the probabilities of getting the kind of a result that was actually attained in each instance and these probabilities turned out to be as a practical matter, nonexistent. The only possible explanation for the great departure from a representative cross-section is that the lists from which the names were selected randomly are not representative cross-section lists. (Tr. 2467-8.)

The following table gives the results of the study:

Exhibit and Page References	Panels and Juries Covered by Exhibits <sup>①</sup>	Probability of Selection for Employed Persons	Probability of Selection for All Persons Including Employed Housewives and Retired
Exhibit W-2, Tr. 2280-3, 2291	Grand Jury Panel February, 1946	1-500,000 <sup>②</sup>	1-100,000,000
Exhibit X-2, Tr. 2296-9	Grand Jury Panel February, 1946	1-70,000,000	1-100,000,000
Exhibit Y-2, Tr. 2304	Grand Jury Panel September, 1946	③	③
Exhibit Z-2, Tr. 2309-10	Grand Jury Panel September, 1946	1-100,000,000	1-100,000,000
Exhibit AA-2, Tr. 2310-11	Petit Jurors September, 1946	69 1-1 0 <sup>②</sup>	74 1-1 0
Exhibit BB, Tr. 2311-12	All 1946 Jurors	127 2-1 0	127 2- 0 <sup>③</sup>
Exhibit CC-2, Tr. 2311-12	Grand Jury February, 1947	1-500,000	1-500,000
Exhibit DD-2, Tr. 2312-15	Grand Jury February, 1947	1-10	1-10 <sup>③</sup>
Exhibit EE-2, Tr. 2315-16	Petit Jury February 3, 1947	1-50,000,000 to 100,000,000	1-50,000,000 to 100,000,000
Exhibit FF-2, Tr. 2316	Petit Jury February 17, 1947	1-50,000,000 to 100,000,000	1-50,000,000 to 100,000,000
Exhibit GG-2, Tr. 2316	Petit Jury February, 1947 Excused	1-50,000,000	1-50,000,000
Exhibit HH-2, Tr. 2316-17	Persons not drawn 1947 <sup>②</sup>	100 1-1 0	100 1-1 0
Exhibit II, Tr. 2317	Overall summary for 1947	104 1-1 0	104 1-1 0

①It was possible to obtain information separately with respect to various panels and other groups selected for prospective jury service and the study was first made separately and then all of the groups were considered together.

②This is intended to indicate that if the names had been selected at random from a representative cross-section of the population, such a selection would have taken place only once in approximately 500,000 times. This is an immeasurably smaller probability than that of getting a Royal Flush. It cannot by any means be considered a representative sample. (Tr. 2291.)

③Due to an oversight, the witnesses did not give the probabilities here, but an examination of the exhibit will indicate that the probabilities appear to be in approximately the same proportion as X-2.

④This indicates that the probabilities are one in the number of times indicated by the figure 1 followed by 69 0's.

⑤The larger the sample the more improbable is the relatively large discrepancy.

⑥This is the only case in which it appears possible that the selection might have been from a representative cross-section.

⑦Not all of the 865 persons placed in the master jury wheel in 1947 had been drawn for service on any panel at the time of the hearing and this exhibit is for those who had not yet been drawn.



It is established by the foregoing that the panel jury and those names placed in the master jury box were not selected from anything approaching a representative cross-section of the community. (Tr. 2318-40.) This is not to say that there cannot be very many right or proper samples drawn from a cross-section. Such a sample is one which does not deviate from a given population more than a certain percentage. In other words, the variation is within certain limits which do result from chance even where the random method is used. Where the variation goes beyond these limits, the result must be attributed to something other than chance, and that something else is either a biased method or a biased application of the method of selection. (Tr. 2319-20.)

Dr. Robinson was asked to compare the probabilities here presented with that presented in the case of *Smith v. Texas*, 311 U. S. 122, 85 L. Ed. 84, in which case the Court said that the underrepresentation of Negroes could not be attributed solely to chance. In that case Negroes constituted 10% of the eligible population, white persons 90%.<sup>1</sup> Over a period of time 18 Negroes and 504 white persons were selected for possible jury service. Of this group 5 Negroes and 379 white persons were actually finally selected for service. The possibilities of this occurring are 8 in 1,000,000 or considerably greater than the probability in almost every example given above, and immeasurably greater than most of them. (Tr. 2321-2.)

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<sup>1</sup>Under the laws of the State of Texas, only those persons who have paid their poll tax are eligible for jury service. (Article 339, Code of Civil Procedure, State of Texas.)

As a matter of fact, the actual probabilities are even less than those shown in the chart. Thus, for example, on Exhibit AA-2 there appear to be a total of 86 business men, managers and officials out of a total of 188 persons. Of the 86, 38 are engaged in finance, insurance and real estate. In making his computations Dr. Robinson did not take into consideration such factors as the incredibly large number of finance, insurance and real estate people within the major classification of business men; he considered only the distribution within the major classification. Had the disproportionate distribution within the sub-classification been taken into account probabilities would have been considerably reduced. Incidentally, every one of the exhibits shows a large preponderance of the businessmen engaged in finance, insurance and real estate entirely disproportionate to their distribution in the population. (Tr. 2325-6.)

In every exhibit there is a tremendous overweighting of proprietors, managers and officials; there is an underweighting of the opposite types and there is an underweighting generally of craftsmen, domestic service workers and the lower classes in the economic and social scale. Laborers are underweighted almost perfectly—there are practically none of them. (Tr. 2326-7.)

The cause for the unrepresentative character of the panels and the juries need not be left to speculation. Each of the methods of obtaining prospective jurors militated against the possibility of obtaining a fair cross-section of the community.

1. Utilization of cards or records which had accumulated since a time prior to 1925 would have the effect of underweighting the lower classes on the scale;—that is, craftsmen, operatives, possibly service workers, and certainly laborers. It would do so for the reason that migration into the Los Angeles region, especially during the war years, was primarily in those classes so that they are proportionately better represented in the population now than they were in previous years. According to California Department of Labor statistics—manufacturing employment for Los Angeles in 1935 was 94,000; in 1946 it was 239,500. In 1935 these workers constituted 3.8% and in 1946, 6.9% of the total population; the proportion practically doubled. When the family group is considered, the 1935 proportion is about 10% as compared with about 20% in 1946. Furthermore, because business men generally tend to migrate from one city to another, much less than workingmen do, a much larger percentage of the workers than the business men listed in the record maintained since 1925 would have migrated, thus increasing the percentage of business men and decreasing the percentage of workers in these records. (Tr. 2327-31.) The foregoing does not take into consideration the unrepresentative character of the list in the first place.

2. The use of the telephone directory would create a probability of obtaining a representative cross-section of not more than one in several millions, or perhaps quadrillions, because the telephone book is statistically biased upward economically. The lower

economic class are extremely underrepresented in the telephone book. If consideration is given to the inability to get telephones in the Los Angeles area recently, it would make the tendency still more pronounced, because the migration into the area has been similarly of low income persons. (Tr. 2231-3, 2439.) The selection from the telephone book was made by the jury commissioner simply looking at names haphazardly and placing them on his list; as previously indicated, no such selection can be made in an unbiased manner regardless of the good intentions of the person involved. This probably accounts to some extent for the complete absence of Mexican, Italian and other such sounding names from the lists submitted by the jury commissioner.

3. A list of registered automobile owners which was believed to have been furnished to insurance companies would not give a representative selection from the community, it being biased upward economically to a greater extent than the telephone book itself. This is particularly true if the list was prepared for insurance brokers or companies, for the reason that insurance companies are particularly interested in owners of new automobiles. (Tr. 2341-2.)

4. The selection of a few names from the Railroad Brotherhood would not be representative of the community, although it would tend to some extent to correct the overwhelming bias in the other direction. (Tr. 2348.) Aside from the fact that the names obtained from the Railroad Brotherhood were very

few in number, the fact is that the method of selection generally employed would necessarily result in a great underrepresentation of union members. (Tr. 2418-19).

5. Certainly, lists from clubs such as the Friday Morning Club, the Ebell Club, the Los Angeles Country Club, and the California Club would be extremely biased upward economically and would not give a fair cross-section of the community. (Tr. 2366.)

6. Obviously Blue Books or social registers are biased upwards economically to a great extent. (Tr. 2367-86.)

7. The fact that only those persons who return questionnaires are even considered for a jury service tends to introduce a further bias in the method of selection. Tests have established that questionnaires are returned primarily from the group of proprietors, managers and officials, and to a somewhat lesser extent from clerical, sales and kindred persons. Craftsmen, foremen, domestic service people, operatives and protective service workers are greatly underrepresented in questionnaire returns. (Tr. 2391-2.)

8. It was pointed out that persons lower in the economic scale are more likely to be excused than others. Thus, for example, in the February 1946 grand jury panel there was one farmer who was called and served; there were eleven proprietors, managers and officials, of whom one-third were excused; there were eight clerical, sales and kindred workers, of whom three-eighths were excused; there

were four craftsmen, foremen and kindred workers, all of whom were excused; and there was one operative and kindred worker who likewise was excused. The record, however, shows that not all persons in lower classifications were excused at all times. The fact that the panels were unrepresentative in the first place with respect to the lower economic classifications made it even more improbable than it would otherwise have been that these groups would be fairly represented by the jury. (Tr. 2300-3.) The very fact that so many of these persons are excused would seem to render it more important, rather than less important, to have them properly represented on the panels, or the lists from which the panels are drawn.

It is an established scientific fact that representative samples cannot be obtained from telephone books, city directories, blue books, Who's Who, and a long list of similar documents. (Tr. 2368-9.)

At the conclusion of Dr. Robinson's direct testimony, the following questions were asked, and answers given:

"Q. Now this last question, Doctor: At one stage of the proceedings you stated that you had never seen a group of sampling, or a selection, that was so far from a cross-section as the selection with which you were dealing here, that you were surprised at it.

A. That is correct.

Q. Now that you know the sources from which these questionnaires were obtained, the method of obtaining these persons, are you still surprised?

A. No, I am not surprised. In fact, it would be mathematically impossible to get a cross-section with that procedure." (Tr. 2403.)

**3. Method of selection of jurors in the Superior Court of the State of California for the County of Los Angeles.**

The Court on its own motion called Mr. Vernon W. Janney, the assistant secretary and assistant jury commissioner of the Los Angeles County Superior Court, as a witness. (Tr. 2190.) That Court is one of general jurisdiction of the State of California for matters over \$2,000 and other matters. (Tr. 2191.) The method of selection of prospective jurors was described by the witness as follows:

"We receive from the registrar of voters the entire voters' registration in the precinct sheets. We took each fifth precinct, in other words, we took 1, 6, 11, 16, and so forth.

Then the precinct sheets that we selected, we took each ninth name, we checked each ninth name, and from the names that were checked we then mailed a letter directing them to report to the Secretary's office for examination." (Tr. 2191.)

For the jury list obtained on February 1, 1947, 33,000 letters were mailed out by that office. Those letters can be accounted for in the following manner: 2,760 returned as undelivered; 12,274 letters of correspondence, either asking to be excused or deferred, and actually deferred because the persons were doctors or lawyers or in poor health or at an age that would disqualify them, or women with children and no one to take care of the children; approximately

16,000 reported for interviews in response to the letters, of whom 9871 were excused at the desk; the balance were given questionnaires to determine their qualifications, as a result of which 2863 were excused and 3705 were approved for jury service. There were only 1527 letters unaccounted for, but experience shows that a good part of those would straggle in over the next several months. Ultimately, the office accounts for all but about 1% of the letters. (Tr. 2192-2208.)

The older the list used was, the greater the percentage of letters unaccounted for. (Tr. 2200.)

Although a list of registered voters would not represent a perfect cross-section of the community, Dr. Robinson testified:

“But it is a well-known fact that among available lists for taking samples from population, the list of registered voters is more representative of, let’s say, the total working population or the total labor force than is any other available list, such as a city directory or telephone book.” (Tr. 2223.)

It is not a perfect source, but it is the best that is available.

Dr. Robinson also testified that the method used with regard to selecting the names from the precinct list was excellent and he could not possibly improve upon it. (Tr. 2224-5.) Using the registration lists and the method described by Mr. Janney, Dr. Robinson testified that the results obtained would fall within probability ranges of one in a hundred. (Tr.



2248-9.) It should be noted that the report of the administrative office of the United States Courts, in evidence as Exhibit 7, states that in New York the registry lists of voters had, at least prior to 1941, been the primary source of names for jurors.

A comparison of the registration lists with the sources used by the Court below reveals the following: Registration lists draw from approximately 1,800,000 names; the telephone book, the most complete source used by the jury commissioner, includes 562,000 names; the other lists used, of course, include very few names; the registration lists are the least biased economically. The telephone book is heavily biased economically, and the other sources are even more restricted and more biased. The registration lists are relatively current, never being more than four years old, while the sources used in the Court below include lists running back twenty-five years. In the Superior Court 90% or more of the letters sent out are accounted for, while in the Court below, not more than one-third of the letters sent out are accounted for. It is in the light of these facts that Dr. Robinson's testimony with respect to the undesirability of the method used by the District Court and the comparative great desirability of the method used in the Superior Court must be judged.

### C. THE LAW.

1. The scope and purpose of the review herein is established by virtue of the Appellate Court's power of supervision over the administration of justice in the trial Court.

It is now established that the method of selection of jury panels and jurors by the District Court is subject to supervision on appeal as one aspect of the Appellate Court's power of supervision over the administration of justice by the trial Court. *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 225, 90 L. Ed. 1181, 1187.

Referring to the *Thiel* case and other cases involving appeals from Federal District Courts, the Supreme Court in the case of *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043, 2059, said:

"These defendants rely heavily on arguments drawn from our decisions in *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *Thiel v. Southern P. Co.*, 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984, 166 ALR 1412, and *Ballard v. United States*, 329 U. S. 187, ante, 195, 67 S. Ct. 261. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

Inasmuch as those matters which are embodied in the concept of due process must of necessity be included in any notions of good policy, the cases originating in both the State Courts and the Federal Courts are applicable here; the broadest rule to be drawn from these cases constitutes the measures to be applied to the selection of jurors in this case.

2. **The defendants were entitled to an impartial jury drawn from a cross-section of the community.**

The basic nature of the question presented here has been stated in the case of *Glasser v. United States*, 315 U. S. 60, 85, 86 L. Ed. 680, 707:

“Lest the right of trial by jury be nullified by the improper constitution of juries, the notion of what a proper jury is has become inextricably intertwined with the idea of jury trial.”

The expanding nature of this concept was emphasized by the Court: “Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.”

No hidebound approach can appropriately deal with such an issue. What may have received long and uncritical acceptance must now meet the challenge of the “basic concepts of a democratic society”. If the system of jury panel selection falls short of this test, no indictment secured from a grand jury or conviction obtained from a trial jury chosen from such a panel may stand.

This growing concept of democracy has led the Courts infallibly to the principle that a jury must be a body truly representative of the community, and that as the representative of the community, it sits in judgment upon the defendant. The jury acquires the authority so to act not because its members are elected as representatives, but because they are selected from a cross-section of the community.

In case of *Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, in which a State Court's conviction was reversed because the trial jury was so selected as to deny the defendant equal protection of the law, the Court said:

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."

This rule was adopted in *Thiel v. So. Pacific Co.*, 328 U. S. 217, 90 L. Ed. 1181, wherein the Court went on to say:

"This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class dis-

inctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”

“Intentional and systematic exclusion” which is condemned is not absent simply because there is a lack of purposeful discrimination. The requirement that there be no “intentional or systematic exclusion” places upon the trial Court an affirmative duty—to avoid discrimination. The means of accomplishing this end must be found by the Court. Thus the Court in the *Thiel* case, goes on to say:

“The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers.”

In *Glasser v. United States*, 315 U. S. 86, 86 L. Ed. 707-8, the Court said:

“The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. \* \* \* If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.”

Here again is an indication of what is meant by “systematic and intentional.” The “deliberate selection of jurors” from a particular source which selection necessarily results in discrimination is “sys-

tematic and intentional" regardless of the motive leading to the use of such a system. Precisely that which has been condemned in the cited case is to be found in this case. Jurors were deliberately selected from private membership organizations. Moreover, there is no distinction in principle or effect between the selection of jurors from a society club or from a society blue book, or from any other unrepresentative source.

The prospective jurors were selected not from a representative cross-section, but from highly selective and unrepresentative lists:

(1) The blue book, which is loaded with society people, business men, people with money, etc.; (2) society, women's clubs, university clubs, golf clubs, etc., which are similarly unrepresentative; (3) The telephone book, which is unrepresentative from an economic standpoint, because a large percentage of workers do not have telephones; (4) Lists of automobile owners prepared for insurance companies, which lists obviously name persons who generally purchase insurance, that is those in the higher income bracket and those who own relatively new automobiles; (5) Personal property lists which are biased against those who do not have personal property of sufficient value to require the payment of a tax; (6) 25,000 to 30,000 names which have been accumulated since prior to 1925, which lists were selected in the first place from the sources enumerated above which fail to reflect the expanding industrial character of the community and which do not take into account

the fact that workers tend to migrate more than business men.<sup>1</sup>

In the case of *Fay v. New York*, supra, the Court pointed to the unreliability of four year old census figures when used to determine whether a jury constituted a representative cross-section of the community; how can it be denied, then, that lists of names more than twenty years old cannot be used to select a representative cross-section of the community.

It is true that a few names were selected from the membership of Railroad Brotherhood Unions, a few from among bank employees, and there were a few Negroes, Japanese and Chinese named. The total of all these constituting a tiny percentage of all the names used, may have tended in some completely unsubstantial degree to correct the unrepresentative character of the lists. The fact remains that in excess of 99% of the names were selected from sources which were unrepresentative of the community and biased upward economically.

Taken in their entirety the sources for jurors are such as to render the jury obtained therefrom "the organ of a special class," obviously a class different from that of defendants, who are manual workers in a low economic status and who are all members of a labor organization—the C.I.O. Despite the fact that

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<sup>1</sup>Supplementing the testimony of Dr. Robinson concerning the unrepresentative nature of telephone books and records of the Railroad Commission show that in 1920 and 1930 a much smaller percentage of persons had phones than now. Therefore, the use of telephone books in past years constituted an even more unrepresentative method of selection than it does at present,

a few workers are found in the lists utilized for jury selection, the inevitable effect of the method of obtaining names is that professionals, business men and executives are in overwhelming preponderance both absolutely and with respect to their proportionate number in the community. Such juries are as surely the organs of special classes as though no workers at all were on the lists. The lack of representativeness differs only in degree and continues so great that its undemocratic and special character is not essentially diminished.

While the trial Court does have the task of securing competent jurors, that task is subordinate to the requirement that a representative jury be obtained. In the case of *Glasser v. United States*, 86 L. Ed. 680, 707, 315 U. S. 60, 85-6, the Court says:

“This duty of selection may not be delegated. *United States v. Murphy* (DC) 224 F. 554; *Re Special Grand Jury* (DC) 50 F. (2d) 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a ‘body truly representative of the community,’ and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.”



Of course, the difficulty of getting completely representative lists must be recognized. It might be urged that because of such difficulty, the use of the telephone book was proper. However, if this were conceded, it would seem to follow that the telephone book should be supplemented by lists designed to overcome the unrepresentative character of that book. Here, however, the exact opposite was done. The telephone book, already biased upward economically, was supplemented almost exclusively by lists which are even more biased economically in the same direction. It would have been one thing to utilize the telephone book supplemented by lists of members of A. F. of L., C.I.O., Railroad Brotherhood and independent unions, and by lists obtained from organizations of Negroes, Mexican-Americans and similar groups. It is quite another matter, however, to supplement the telephone book by the blue book lists from society clubs, etc. In one instance, the obtaining of a fairly representative cross-section might be possible; in the other, it is simply impossible.

By far the best method that was pointed out during the course of the testimony was that used in the Superior Court of the State of California in which there was a random selection from the voters' register. It is true that this register includes only about 70% of those eligible for jury service. However, it has each of the following advantages:

1. It contains more eligible names than any other list—about three times as many as the telephone book, for example.

2. It does not discriminate against persons because of their economic status, in that it does not require any payment of money to register.

3. It does not require that an individual belong to a particular club, own a new automobile, have a sufficient amount of personal property to be taxed, or even have enough money to have a telephone.

There may be many methods of jury selection which may properly be used. What is required in any event is that the system comport with "the concept of the jury as a cross-section of the community."

"Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted. That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may one by one lead to the irretrievable impairment of substantial liberties." *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680.

*Smith v. Texas*, 311 U. S. 128, 85 L. Ed. 84, 86:

"The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted that they did not select any negroes, although the subject was discussed, but both categorically denied that they inten-

tionally, arbitrarily or systematically discriminated against negro jurors as such. \* \* \* But even if their testimony were given the greatest possible effect \* \* \* we would still feel compelled to reverse the decision below. *What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously, or ingenuously, the conviction cannot stand.*" (Emphasis ours.)

Thus it is not necessary that there be a purposeful exclusion; the intentional use of a system of selection, such as that involved here, which results in discrimination is included within the framework of the phrase "systematic and intentional exclusion."

3. **Systematic and intentional discrimination can be established through proof either that the method of selection would necessarily result in discrimination, or that the selections could not have resulted from a system of selection designed to secure a representative cross-section of the community.**

In the case of *Thiel v. Southern Pacific*, 328 U. S. 217, 90 L. Ed. 1181, the Court clerk testified that in making his selections for jury service he did not include persons who worked for a daily wage. It was thus established that a system was used which would necessarily result in discrimination. However, it does not follow that this is the only way to prove discrimination. The absence or gross underrepresenta-

tion of any major economic, religious or racial group would lead to the same conclusion.

In *Smith v. Texas* (supra), somewhat over 10% of the population eligible for jury service consisted of Negroes. Utilizing the 10% figure and assuming that all Negroes were qualified to vote (and the *Smith* case indicates to the contrary), then if the Negroes had been proportionately represented in accordance with their numbers in the eligible population, there would have been approximately 50 instead of 18 Negroes on the panel and approximately 40 instead of 5 would have served.

In the face of uncontradicted testimony to the effect that there was no intent to discriminate against Negroes, the Court held that because the discrimination could not be accounted for by chance alone, there was sufficient proof to invalidate the grand jury proceedings.

“Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service.”

In both the cases of *Thiel v. Southern Pacific* (supra) and *Smith v. Texas* (supra), motives were held immaterial where there was the intentional use of a system which resulted in discrimination. In neither case was there any direct evidence of any desire to discriminate against any particular group or class of persons. In the *Thiel* case the fact that discrimination was the inevitable result of the

system used was sufficient proof of "intentional and systematic exclusion." In the *Smith* case, it was established by the fact that the variation from a representative cross-section was such that it could not be accounted for by chance alone. Basically, the only distinction between the two cases on this point is the method of proof.

The question here is whether there has been the intentional use of a system which resulted in discrimination against workers and persons in lower economic categories. Such intentional use constitutes "systematic and intentional exclusion" within the meaning of the cases. The determination of that question of fact may be made upon the basis of the results of the system used, as well as by the examination which has been made of the system itself. Here the occupational distribution of the jurors selected for prospective service is such that the discriminatory nature of the method used for their selection is clearly established.

It might be well to consider, at this point, the nature of the data used in the study made in the Court below. In the case of *Fay v. New York*, 332 U.S. 261, 91 L. E. 2043, a census classification comparison similar to that utilized here was presented in the lower Court. The Supreme Court in that case found that discrimination was not established by the use of census data for a number of reasons:

1. There was a five-year discrepancy in the dates of the data used. Here too there is a discrepancy be-

tween the date of the census figures and the selection of the juries involved. However, as has been established by expert testimony, because of the change in the character of the population, the effect of that discrepancy has been favorable to the prosecution rather than otherwise; this is so because persons in the lower economic groups, those who have been least well represented on the juries, have increased proportionately in the population during that five-year period.

2. The Court held that the conclusion that discrimination existed would be justified "only if we knew whether the application of the proper jury standards would affect all occupations alike, of which there is no evidence and which we regard as improbable". In that opinion, great emphasis is placed upon the character of the population of the City of New York, as containing a large number of non-citizens and a large number of persons who cannot read and write English, etc. That situation does not exist in the Los Angeles area. Furthermore, in this case the study includes all of those persons who were ever considered for jury service—that is, it includes those who were excused because they were not qualified. Lack of qualification among those in the lower economic brackets, therefore, cannot explain in this case the tremendous underrepresentation of persons in such classifications. Finally, on this point, an expert witness testified that the selection made could not be reconciled with the use of a proper method of jury selection. There was no such testimony in the *Fay* case.

3. In the *Fay* case the challenge was directed against a special panel which was drawn from a general panel, and no comparison was made between the general panel and the special panel, nor was there any complaint that the general panel had not been drawn properly from the overall population. In addition to those disqualified or exempted from general service, persons were eliminated from service on the general panel by certain special tests. Each such test had a direct relationship to qualifications for jury service. "The uncontradicted evidence is that no person was excluded because of his organization or economic status."

Thus the real holding of the *Fay* case is that, the issue being limited to whether there was proper selection from the general jury panel, only that selection is material and the evidence established neither that it was in essence discriminatory or that it resulted in discrimination.

Here the challenge was directed to the original drawing or selection of the jurors from the general population. The occupational characteristics of the persons were tested at every stage of the selection proceedings and the study made included persons who actually served on a jury, those who were placed on jury panels, those who were excused or disqualified from service and even those who had not yet been subpoenaed to appear in Court to determine whether they should be placed on panels. Here the overall comparison was the population conclusively established the discriminatory nature of the selection.

4. In the *Fay* case a question appears to have been raised concerning the reliability of the classification system used as a means of determining what constitutes a representative cross-section of the community. It will be noted that two tables are referred to, only one of which uses the major census classifications. The remarks of the Court concerning the reliability of the method of classification were apparently directed to the other table.

In any event, here, as was not done in the *Fay* case, uncontradicted expert testimony was presented to the effect that the census classifications reflect social and economic status, particularly with regard to employment relations. The expert also testified that persons in the different classifications tend to have different economic and social views. This expert segregated the jurors into the groups reflecting such different views and among those groups there appeared the grossest kind of discrimination.

5. Finally, on this point, the Court in the *Fay* case said:

“On the other hand, the evidence that there has been no discrimination as to occupation in selection of the panel, while from interested witnesses, whose duty it was to administer the law, is clear and positive and is neither contradicted nor improbable. The testimony of those in charge of the selection, offered by the defendants themselves, is that without occupational discrimination they applied the standards of the statute to all whom they examined. We are unable to find that this evidence is untrue.”



Here it is not necessary to find the testimony of the Jury Commissioner and of the Court Clerk untrue in order to explain the discrimination. As a matter of fact, their very testimony as to the method of selection constitutes a full explanation. On the one hand the claim that the system used was discriminatory was corroborated by the results of the selection as shown by comparison with the census figures; on the other hand, the fact that the results as shown by the census figures proved discrimination was corroborated by the discriminatory nature of the system used.

The complete impossibility of results such as those which were found in this case being achieved through the use of a proper system is clearly demonstrated by the testimony of Dr. Robinson. It might be well to note, however, that the Grand Jury which returned the indictment had on it two professional persons, fourteen proprietors, managers and officials, and five clerical, sales and kindred workers. There were no craftsmen, no operatives, no laborers, no domestic workers—none of the persons on the jury were in the lower occupational classifications. As shown by the census, the occupational group from which all of the jurors were drawn constitutes less than one-half of the total working force. From that portion of the population constituting more than one-half of the working force at the lower end of the economic scale, no jurors at all were selected. It should require no citation of statistics to establish that among those economically best off, particularly among professionals, among proprietors, managers and officials, and even among white collar workers, trade union

members are fewer than in the lower economic bracket. Even this does not tell us the entire story. On this Grand Jury, professionals and clerks were represented in just about the proper proportion. Business men, however, were overrepresented at the ratio of five to one.

On the Grand Jury panel there were seven professionals, twenty-one proprietors, managers and officials, four craftsmen, and one operative. Thus, although there are fewer proprietors, managers and officials than craftsmen in the population, the proprietors were represented better than five to one on the jury panel as compared with craftsmen. There are about one and one-half times as many operatives as proprietors in the population; yet the proprietors were represented at about the rate of twenty to one. There are a few less service workers than proprietors, but there are twenty-one proprietors and no service workers. There are one-third as many laborers as proprietors, but there are twenty-one proprietors and no laborers. From the lower half of the population, economically speaking, came less than 10% of the entire panel; from the upper half, came the other 90%. It would require more space than is warranted to examine each of the exhibits separately. However, the exhibits will reveal the amazing consistency of the over-representation of proprietors, managers and officials, and of the under-representatiton of workers.

It will be remembered that in the case of *Thiel v. Southern Pacific*, 328 U. S. 217, 90 L. Ed. 1181, *supra*, the wives of workers appeared to be adequately repre-

sented on the panel. This fact was stressed in the dissenting opinion by Mr. Justice Frankfurter who pointed to it as an indication that there was no purposeful discrimination. In that respect this case is even clearer than the *Thiel* case; here wives of workers, as well as retired workers, are underrepresented to the same extent as the workers themselves.

Such statistics can only mean that the jury officials utilized a system for selection of jurors other than one consistent with the obtaining of a representative cross-section of the community. It is obvious that the defect in the system is of an economic and social nature, completely unjustified by the democratic principles of the jury system.

The case of *Fay v. New York*, 332 U.S. 261, 91 L. Ed. 2043, 2059, recognizes the principle that the method of organization of a jury may be deduced from the results of such organization. Speaking of the high ratio of convictions previously noted therein with respect to special juries as compared with regular juries, the Court said:

“But a ratio of conviction so disparate, if it continued until 1945, might, in the absence of explanation, be taken to indicate that the special jury was, in contrast to its alternate, organized to convict.”

Here just such a disparate ratio exists with respect to the distribution of occupational classifications in the community on the one hand as compared on the other with persons selected for possibly jury service.

It is not necessary to rely upon a lack of explanation here to reach the conclusion that this result is attributable to the system used in selecting persons for jury service; an examination of the very system affords that explanation and confirms the conclusion reached from an examination of the results of that selection.

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### **SUMMARY.**

The defendants were entitled to an impartial grand jury and to an impartial trial jury. This does not mean simply a group of individuals each of whom individually meet the test of impartiality to the extent that he may escape a challenge for cause in a particular case. Among thinking men, complete impartiality on any subject can seldom, if ever, be found. The only way that it is possible to get an impartial jury is through its selection from a cross-section of the community, so that the final jury is composed of twelve individuals who within their own classifications and within their own limitations are individually impartial, but who when taken together are representative of a community.

Such a cross-section can be obtained through a method deliberately devised to achieve it. For example, the jury commissioner and the clerk can see to it that various major occupational classifications, and the various racial and religious groups are represented on the jury panels approximately in their proportion in the community. On the other hand, it

can be obtained by using a method reasonably designed to achieve a cross-section, such as the utilization of the voters' register and the random selection of names therefrom, so that any variation from a cross-section of the community is a result of chance, and chance alone. What is forbidden is the utilization of a system which necessarily leads to discrimination in favor of one class or group and against another.

Almost thirty years ago a United States District Court judge, in the case of *United States v. Standard Oil Co.*, 170 Fed. 988, 994, analyzed the basic principles involved here. He said:

“As I said this morning, a man is entitled to a fair trial. This defendant is a corporation, but the same rules apply. A defendant is entitled to a fair and impartial trial. Now, without reference to how this comes to be or without reference to the way it came about, and without suggesting in any way that any one is to blame for it, yet here is a case of wide public interest, and everybody has probably some view on the matter. It has been much discussed, and it involves problems in regard to the transportation of commerce in a large way. Without going into the matter very far, we know that there are certain views taken on some subjects in the city, and other views are taken in the country, whether right or wrong. The views of the people who live in large communities and do business in a large way and on a large scale do not always harmonize with the views of people who live in smaller places and do business on a smaller scale. I am not now saying

which set of people are nearer right. It is not for me to say.

Without any reference to how it happened, it so happened that this case is tried in a district that is composed, as I have said of this enormous commercial city and the small rural towns outside. The air may be much purer out there than it is here. The moral standards may not only be different, but they may be better; I do not know; it is not for me to say. The degree of intelligence outside may be equal to the intelligence in the city, and that is not for me to say. But what is a jury? The jury is a jury of men, a jury of a man's peers. What is the verdict of the jury that we are after? It is the average judgment of 12 men, not the judgment of 12 carpenters, 12 farmers, 12 bankers, or 12 professional men, but the average judgment, I might say, of average men. It so happens that this venire drawn here today, or this panel, or whatever you may call it, is composed of men, I assume, beyond reproach in character and standing and capacity, but they are all with the exception of three, outside of this great commercial city, which is a large part, a major part, of this district so far as population, business, and wealth are concerned, and it so happens, by reason of that fact, that a large proportion of these men are farmers. As I said this morning, I think mighty well of the farmer as a juror. I have seen him tried for a long time. I don't think the farmer is any better than other people in some respects, but as a rule he is a good juror; and I think there are questions in this case which farmers may be thoroughly qualified as jurors to try. Yet the probabilities are

that if the jury were composed partly of business men that a more satisfactory conclusion might be reached, or if not a more satisfactory conclusion, yet the conclusion would be accepted more satisfactorily.”

In the instant case, the defendants were members of a C.I.O. union. They engaged in and claimed the right to engage in activities common to labor unions. That workers generally tend to take a more favorable view to such activities than do businessmen is hardly subject to doubt. Defendants were entitled to a jury in which the predilections of businessmen were not predominant, they were entitled to a jury in which the attitude toward their activities was generally representative of the community attitude on these matters. Jury panels selected from sources biased upward economically and, as a result, made up primarily of businessmen and professionals with a corresponding underrepresentation of workingmen is not a basis for the selection of such a jury.

We are dealing here with a fundamental right, one which goes to the very substance of our jury system. Consideration neither of expediency nor convenience should give way to implementing, expanding and strengthening that system in accordance with the developing processes of the law. The recognition that juries must be selected from an impartial cross-section of the population is a comparatively recent one in the law and is to be welcomed as furnishing added vitality to our overall democratic process. It

gives renewed life, vigor and meaning to the right of trial by jury.

The questions presented here must be decided in the light of the broad social issues involved. The existence of an unfair system of jury selection injures these defendants, but what is more important it undermines the jury system itself. As is stated in the case of *Ballard v. United States*, 91 L. Ed. Adv. Op. 195, 199:

“This injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”

What is at stake here is not alone the rights of these defendants, but, what is even more important, the proper functioning of the jury system itself. An examination of other cases reveals none in which there was presented so complete a record or one including an expert sociological and statistical analysis. If there is merit to defendants' contentions, and it is submitted that there is, the evil which has been demonstrated to exist should be struck down now. If that is not done, the discriminatory practice will be allowed to continue unabated and an opportunity to eliminate practices damaging to the administration of justice will be lost.

The motion to dismiss and the motion to quash the trial jury panel should have been granted. The denial of these motions was error and on these grounds this case should be reversed.



We respectfully submit that the judgment of the trial Court should be reversed.

Dated, San Francisco,  
May 15, 1948.

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(Appendices Follow.)



## **Appendices.**



## Appendix A

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“§ 1. *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45, as amended and supplemented, of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between

factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.”

## Appendix B

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Sixty per cent or more of the members of Local 36 do not own any interest in a fishing boat. They merely work in the industry on boats owned by others. (Kibre, Tr. p. 1355.)

Approximately 450 small boats fish out of San Pedro harbor. Local 36 has members on approximately 175 out of the 450 boats. However, these 175 boats are not manned entirely by members of the Local. (Zafran, Tr. pp. 1616-17.)

Of the defendants, the following have never owned a fishing boat: Kennison, who lives in a trailer, and who supplements his income by engaging in casual labor, such as washing the bottom of a boat or painting the bottom of a boat (Kennison, Tr. p. 1445); Kibre, who is secretary-treasurer of the international organization of which Local 36 is affiliated; Zafran, who never owned a boat and who, when he developed ulcers, became the business agent of the Local (Zafran, Tr. p. 1514); McLauchlan, who is now a bee-keeper (McLauchlan, Tr. pp. 1609-10); and McKittrick. (Tr. pp. 1748-49.)

The other defendants have all owned a fishing boat at one time or another. Defendant Sawyer purchased a boat in 1945 at a total cost of \$4400.00. He owned it for a little over a year during which period he used it about a third of the time. The other two-thirds of the time he spent either repairing the engine on his boat or fishing on other boats. He sold his boat in the spring of 1946. (Sawyer, Tr. 1455-6.) The

appellant Smith together with a partner purchased a boat in 1935 at a total cost of \$2,000.00. His boat was financed in its entirety by the Coast Fishing Company of Wilmington. (Smith, Tr. 1471.) The appellant Knowlton purchased a boat in 1922 for \$250.00. He sold that boat and later, together with a partner, bought another boat for \$800.00. The second boat was blown up, and about a year and a half later he bought a third boat at an original cost of \$3,000.00, making a down payment of \$1,000.00 and thereafter making annual payments. At the end of six years, interest and insurance had accumulated to a total of \$3,400.00, so he turned the boat over to the Van Camp Cannery, which had financed the purchase in the first place. In 1936, this appellant purchased another boat for \$2,500.00 (the boat shown in the motion picture, Exhibit BB), which he owned at the time of trial. An objection to the question as to how much he still owed on the boat was sustained by the Court. (Tr. pp. 1580-3.)

The appellant McComas purchased a boat in 1942, for which he paid \$1,000.00. Thereafter in 1944, he sold that boat and purchased a smaller one. The original boat was operated with a crew of two including the appellant, whereas the second boat was generally operated by the appellant only. (Tr. pp. 1596-7.)

The appellant Munson purchased a boat in 1934 for which he paid \$640.00, \$300.00 down and \$50.00 a month. In 1942 he sold that boat and in 1945, he and his wife together built a fishing boat which he



and his wife thereafter operated. (Munson, Tr. pp. 1694-6.)

The appellant Phelps lives on a fishing boat and has no other home. He supplements his fishing income by occasionally doing a bit of engine work on other boats. He purchased a boat in 1934 for the sum of \$350.00. At the end of one year, he sold it for the same amount, and went to sea as a marine engineer. In a short time he came back and then went fishing again, working on boats owned by other persons. In 1940 this appellant bought a second boat for which he paid \$650.00. At the end of four months, he sold that and has not owned a boat since. At the time of trial, his fishing property consisted of three fish traps. (Phelps, Tr. pp. 1603-6.)

The appellant Lackyard, who was a housepainter before he started fishing, acquired a boat in 1943 for which he paid \$450.00, and which boat he owned at the time of trial. (Tr. pp. 1697-8.) During the time that he has owned that boat, he has fished on other boats as well as his own. (Tr. 1700.) In 1936, appellant Hill obtained an old hull which had been discarded, put in an automobile motor and built his own boat at a total cost of about \$500.00. He sold his boat in 1942 for \$450.00, at which time he bought a second boat, for which he paid \$1,000.00, and which boat he still owns. This appellant also worked on other boats during the period that he owned his boat because there were times when the only kind of fish which was available was fish for which only larger boats had the necessary equipment and facilities. (Hill, Tr. pp. 1703-6.)

## Appendix C

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Thus, one Government witness familiar with the records of dealers, which records were required to be kept by law, testified to this effect. (Sander, Tr. pp. 805, 819.) Records were introduced as one example. (Ex. E & F, Ross, Tr. pp. 256-7.) Various defendants testified that the practice of fishermen was to favor specific dealers in the sale of fish because by this method, they obtained some assurance that when there were large quantities of fish, they would be able to sell it. When a fisherman brings in a load of fish, he goes to a dealer, finds out what price the dealer is going to pay, and then proceeds to fill the order at that price. If he has more fish than any one dealer wants, he will sell the rest to another dealer or dealers, receiving the same price per pound of fish from each of the dealers. As one fisherman testified, he does not discuss the price with the buyer. "He makes out the ticket, and I take whatever he puts down on the ticket". (McComas, Tr. p. 1599.)

## Appendix D

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One Government witness testified that it was a general practice for fishermen to borrow money during the wintertime from one of the dealers or from other sources, and that he personally kept owing and paying one dealer back all of the time. (Souder, Tr. pp. 813-15.) One of the defendants also testified to this common practice to borrow money from the dealers, stating that when money is borrowed there is a verbal agreement for preference in delivery of fish to be given to such dealers. (Smith, Tr. pp. 1475-6.) In addition, dealers finance boats and gear and rent nets, the fishermen involved delivering their catch to the dealer during the financing or the renting. (Naylor, Tr. pp. 931-2.)

In addition, some of the dealers own an interest in boats, and permit fishermen to use them on a share basis. Such dealers can at any time remove the fishermen from the boat, either lay it up or let other fishermen use it. Fishermen on these boats deliver all of their catch or give a preference to the dealer having an interest in the boat. (Vitalich, Tr. pp. 349-51, DiMassa, Tr. pp. 419-24, Bregante, Tr. pp. 516-17, Naylor, Tr. pp. 851, 860-1, 905-6, 925.)

## Appendix E

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As has been previously pointed out, there are two types of fishing boat fleet on the West Coast—the small boats and the large boats. In the San Pedro area, the two were first organized together in 1934 in an organization known as the Fishermen and Cannery Workers International Union.

As the defendant Kibre testified:

“The Union was organized around the question of getting a minimum price contract for sardines, tuna and mackerel delivered to the canneries. That was actually the objective that led to the organization of the union. And their first step was an attempt to secure from the canneries such a contract.” (Tr. p. 1169.)

At the time of the organization of the fishermen in 1934, they engaged in a strike in order to obtain a contract. (Kibre, Tr. p. 1172.) About the same time the Alaska and Puget Sound fishermen organized in two separate organizations. (Kibre, Tr. p. 1173.)

In 1936 the existing organizations of fishermen on the West Coast formed the Federated Fishermens Council and within a few months after its organization, it applied to the Committee for Industrial Organizations—as it was known at that time—for a charter, which was granted late in 1937 and the organization then became known as the International Fishermen and Allied Workers, the international organization with which Local 36 is affiliated. The new international began its operation in 1938.

The organization of small boat and large boat fishermen of the San Pedro area became local 33 of the new international. Before 1943, the small boats in Newport Beach, where there were no large boats, were organized in Local 36 of the international in 1943, Judge McCulloch of the Federal District Court of Oregon, handed down a decision in a case in which fishermen seeking minimum price agreements were charged with violation of the Anti-Trust laws. He held that the fishermen were properly operating as a marketing organization. As a result of this decision, the convention of the International Union in December of 1933 called for the promotion and stimulation of group bargaining on the part of small boat fishermen.

As a consequence of that decision, the union embarked on a program of developing group bargaining among small boat fishermen, particularly those engaged in the delivery of fresh market fish. As a result of this organizing drive, small boat fishermen were organized in most of the ports of Southern California and in 1944 the Newport local—Local 36—was reorganized to include all small boat fishermen in the Southern California area. (Kibre, Tr. pp. 1183-6, 1406-7.)

In 1938 a strike among fishermen was conducted in Southern California which lasted for several months. During the same period in Northern California, the catch has increased about five times, and there has been a steady upward trend. (Kibre, Tr. pp. 1229-30.)

## Appendix F

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Local 36 and its representatives insisted again and again from the very outset of the controversy that the principal thing that they were interested in was that a fisherman should know what price he was going to receive for his catch before he went out to fish. (Ross, Tr. p. 193.) The dealers took the position that they could sign no such agreement as it was submitted, because they were under the compulsion of a cease and desist order issued by the Federal Trade Commission, sometime between the years 1938 to about 1940. (Ross, Tr. p. 117.) The position of Local 36 was that the order referred to dealt with the situation where the dealers had gotten together themselves for the purpose of buying fish at a definite price set by them for the fishermen and by selling fish at a definite price which they set for their customers, whereas, the agreement proposed by the fishermen was one between the producers of fish, those who performed the labor necessary to catch the fish, and the wholesaler, and that the anti-trust act was not intended to apply to such a situation, but that the Fishermen's Marketing Act and the Clayton Act were intended to apply. (Zafran, Tr. pp. 1525-9.) The dealers persisted in their position and stated that they wanted to get a Government ruling which they had been unable to get up to that time and that perhaps the only way to get such a ruling was for the fishermen to proceed with their strike. Accordingly, on May 27, 1946, Local 36 sent a letter to the fresh fish dealers advis-

ing them that unless a minimum price agreement was signed by the next day, that the strike would be begun. The letter went on to state: "The purpose of this decision was to expedite matters and get a decision from the government agencies in reference to the legality of signing a minimum price agreement." The quoted paragraph was in response to the suggestion of the dealers that if the strike was called, the government agencies might move in and give an opinion about the legality of the agreement. (Govt. Ex. 236, Zafran, Tr. pp. 1531-2.)

The defendant Jeff Kibre had been in the East at the time that the strike started. Immediately upon his return on June 10, 1947, a meeting with the dealers was called. Defendant Kibre informed the dealers on behalf of Local 36 that he was very anxious to see if an immediate settlement of the difficulties could be arrived at. He stated that the primary concern of the Union and of himself as a responsible officer of the International was precisely the question of a marketing program and that he was sure that the strike could be ended as soon as the dealers showed evidence that they were negotiating in good faith. The attorney for the dealers stated that he had advised his clients that he did not see how they could possibly enter into an agreement with the fishermen to fix the prices of fish and that any such agreement would be a violation of the Sherman Act. The defendant Kibre replied that he had made some study out of sheer necessity of the Fishermen's Marketing Act and that he had read Judge McCulloch's deci-

sion of January, 1944, which held that the contract between the Columbia River affiliate and the Columbia River Packers Association was not in violation of the Sherman Act and that the situation in San Pedro was absolutely identical with the situation on the Columbia River. He pointed out that Judge McCulloch had held that the Union could be treated as a co-operative for the purposes of the Fishermen's Marketing Act, and that therefore group bargaining for minimum price contracts between the fishermen's union, representing the fishermen and the dealers was not in violation of the Sherman Act. The defendant Kibre further pointed out that there was a question about the validity of a closed shop provision and that this question was pending in the San Francisco District Court, in a declaratory relief proceeding, but that no question concerning a closed shop was involved in the negotiations at that time because the Union was not asking for any such provision. The defendant Kibre also pointed out that the War Labor Board had ruled that the prices paid to fishermen constituted wages or could be treated as wages and that it would set such prices because they were wages. At that meeting the dealers stated that there was no question concerning the reasonableness of the Union's demand and that the prices proposed were very reasonable. The dealers stated that they recognized the fishermen had been faced with steadily rising costs of operation and that they were entitled to a price such as the O.P.A. had set. The defendant Kibre then went on to say (Tr. p. 1329):



“It is not a matter of signing a particular contract that we should be concerned with, but what we are interested in is trying to work out some form of agreement here which will give the fishermen some measure of security so that they will know what they are going to get when they go out to make their catches, and that we felt that such a measure of security was indispensable to the bringing about of a sound relationship of the fishermen and the dealers in this area so that we could then go ahead on a full-fledged marketing campaign.”

As a result of that meeting, a small committee was created to meet the following morning in the office of the attorney for the dealers. At that time a suggestion which had previously been made by the attorney for the Union was again considered and an agreement was worked out in accordance with the suggestion, providing for the establishment of prices on a trip-by-trip basis. The attorneys for the Union and the dealers jointly dictated a proposed exchange of letters which provided for a termination of the strike and for a temporary arrangement for the sale of fish. This agreement stated that both parties had recognized that the existing situation where fishermen go out to fish without having any advance assurance as to the price to be paid is the basic cause of the dispute and that means should be found to end this situation. The Union therefore proposed, and the dealers accepted in their reply letter, that prior to the departure of a fishing vessel, the anticipated catch of the vessel shall be offered to a fish dealer at

a fixed price, that the individual fish dealer shall be at liberty to accept or reject this price, or to arrive at another price by negotiation on the spot, and upon agreement the vessel will depart for fishing and upon return the load of fish will then be distributed to the dealers who have agreed in advance to accept the fish at the stated price for that particular trip. (Defs. Exs. A and B.) The attorneys and the parties agreed that this proposed contract could not possibly constitute a violation of the Sherman Anti-Trust Law. Meetings were immediately held by the various subdivisions of the Union and the proposed agreement was accepted, with the recognition on the part of the Union that it constituted a distinct victory for its objectives. (Defs. Ex. P, Govt. Ex. 224.) The dealers on the other hand refused to execute the proposed letter and instead stated that the agreement, which their own attorney held did not constitute a violation of the Sherman Anti-Trust Law, was in fact in violation of that Act. (Defs. Ex. C.) At a union meeting about that time the defendant Kibre said:

“For the members who are not up to date with negotiations, Brother Kibre explains that an agreement was drawn up wherein both attorneys were agreed on the legality of the agreement, which is unusual. The dealers also thought the agreement fair and from the Union standpoint it was satisfactory, but that in a matter of two days the dealers changed their minds and decided not to sign the agreement, again bringing up the anti-trust scare. That it's not known yet whether the dealers are actually on the level and ultra ultra

scared or if something else is in the background which has not yet come to the surface. Either their attorney or the Anti-Trust people are being needled by someone else. Whatever the trouble is it should come out within a few days. In the meantime, our attorneys in Washington are working on it and on the Anti-Trust people in order to get to the bottom. We should hear from them in a few days.”

On June 28 the dealers were notified of the termination of the strike by the International, which stated in part:

“It should be clearly understood that the Union will not permit a return to the long standing condition whereby fishermen in this area were forced to accept whatever price dealers arbitrarily set. This condition of uncertain prices, restricted production, forced high prices on consumers and kept the local industry chained to horse and buggy methods for the past 25 years.

“Only when fishermen are assured of a fair price before investing their labor and other costs in making a catch, can the San Pedro market industry operate on a full production basis with modern facilities and methods. The position of the Union is, therefore, a fight for the public interest—for more and better fish at fair prices to the consumer—as well as a struggle for a square deal to the producer.” (Defendants’ Exhibit W1.)

Kibre (Tr. pp. 319-55.)

Appendix G

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Another offer of proof was submitted upon the basis of material prepared by the California C.I.O. Council Research Department. Following is a summary of this offer of proof:

The size of the small boat fleet in Southern California and its relation to the fresh-market fish industry is indicated by the following facts:

1. The small boat fleet in Southern California ranges in number between 944 and 1,195 for the year 1946, with the former number probably more accurate for the purpose of establishing the number of small boats actually engaged in full time commercial fishing.

2. The number of union boats in the small boat fleet is 504.

3. Purse seiners and tuna clippers are large boats bringing in fresh fish from time to time. But neither the Fish and Game Division nor the union can estimate how many of these large boats bring in fresh fish; nor when; nor how many individuals are involved; nor the amount and value of the fresh fish they do bring in.

4. The operators and crewmen of these boats (purse seiners and tuna clippers) are not members of Local 36, the local under indictment, but they do supply the fresh fish market.

5. Not all of the small boats fish for the fresh fish market. Actually the greater majority fish only for

albacore and mackerel for the canneries. This refers to Southern California generally; the situation varies in Santa Barbara where there is no mackerel cannery fishing. They will fish only for the fresh-market fish in the season when albacore and mackerel are not available. The reason fishermen prefer fishing for cannery fish is that the price and market are steady, and the canneries will take their entire catch even though the fresh market may pay slightly higher unit price.

6. There are a very small number of boats that fish for the fresh market all the year around. The union estimates them to number about 20.

7. In addition to these 20 boats, the union estimates that 236 small boats (25% of the small boat fleet) are regularly engaged in gresh market fishing as an auxiliary activity to their primary interest—fishing for the canneries.

Concerning the number of fishermen engaged in fresh market fishing, the following facts are offered:

1. The number of commercial fishermen in Southern California in the license year 1945-46 was 7327 according to the records of the Division of Fish and Game.

2. The Union estimates that there are 1437 regular commercial fishermen in Southern California in the small boat fleet. 747 of them are CIO members. 90% of them work on one-two- or three-man crew boats.

3. There is a good deal of competition in the fresh market from non-commercial fishermen. The exact amount is impossible to determine.

4. There are, according to the union estimate, 419 regular commercial fishermen engaged in fishing for the fresh market.

5. There are in addition to these 419 an unknown number of fresh market fishermen including small boat fishermen, party boat fishermen, and crewmen of purse seiners and tuna clippers. These fishermen compete with the regular fresh market fishermen at various times by furnishing irregular and varying amounts of fresh fish to the market.

With respect to the quantity of fresh market fish, there are the following facts:

1. The amount of commercial fish (cannery and fresh market) varied between 500,000,000 pounds and 739,000,000 pounds in the nine year period beginning in 1938.

2. The commercial catch in June, 1946, was substantially higher than the average catch in the last 7 years and 3 times as high as the 1942 catch.

3. The amount of fresh fish caught in the same period varied between 11,000,000 and 17,000,000 pounds.

4. The leading fresh fish are (1) barracuda, (2) mackerel, (3) California Halibut, (4) yellowtail, (5) white seabass, (6) swordfish.

5. Other factors beside price determine landings, e.g., the variable mackerel catch.

6. Fresh fish caught varies between 1.8% and 3.1% of the total fish landings.

7. The small boat fleets catch consist 87.6% of cannery fish and 12.4% of fresh fish.

8. Small boats will normally catch fresh fish if the mackerel and albacore season are ended.

With respect to fish prices, there are the following facts:

1. The prices paid to the fishermen for approximately one-third of their fresh fish are guided by the cannery price paid for the same species.

2. Barracuda represents the largest catch of non-cannery species of fresh fish.

3. Retail prices are determined by the price of fresh fish from other areas. The volume of out-of-state or Northern California fresh fish far outweighs Southern California fresh fish sold on the Los Angeles market.

4. In the month of June, 1946, during the strike, 413,225 pounds of fish were brought into Los Angeles County from the states of Oregon and Washington, compared with 293,251 in May, 1946. During the month of June, 242,636 pounds of fish were brought in by railway express agency as compared with 196,960 in May. These figures include the entire Los Angeles area. For San Pedro, the figures are for June, 41,407 pounds and for May, 1946, 35,741 pounds.

5. Seattle has much superior freezing facilities than Los Angeles, and therefore, fish can be and is shipped in continuously from the Seattle area.

With respect to the earnings of fishermen, the facts are:

1. The earnings of Los Angeles fishermen on both large and small boats varies according to the manner in which the statistics are evaluated from \$1554.00 to \$2221.00 per year.

2. The average earnings of all small boat fishermen engaging in fresh market fishing is about \$1,022.00 per year.

3. The fluctuation in prices paid to fishermen is very great. For example, in January of 1942, halibut ranged from 8¢ to 25¢ per pound. In November, 1946, mackerel ranged from 1½¢ to 10¢ per pound. Similar fluctuations appear practically every month.

A number of offers of proof were made orally during the course of the trial. Some of them have been referred to in the footnotes under the statements of fact. Other such offers of proof are:

1. In 1937 and prior thereto, fish often sold to the dealers at so low a price that fishermen acting through the Union used to give their catch to charities, and in order to comply with the law and not destroy their fish. In 1936 and 1937, there were considerable negotiations with the wharfside dealers in San Pedro in an attempt to remedy this condition. As a result of such negotiations, the Union did appoint a man for a period of several months who acted on the pier,



first trying to negotiate for the individual catches of the fishermen for the purpose of getting the best possible price for each fisherman. That practice went on for several weeks. However, because of the fact that the individual appointed by the Union was always offered uniform prices by the dealers at any given time and at no time was able to negotiate any different price with any dealer than the first offer that was made to him at that given time, the practice of attempting to negotiate was discontinued. Thereafter, for several months the man did remain on the wharf and did participate in the process of weighing the fish as it came in. However, there was no further attempt to negotiate individual prices. (Tr. pp. 1501-4.)

2. Supplementing the offer of proof with respect to fishermen's earnings heretofore set forth in a footnote is the following:

(a) The defendant Kennison first fished during the year from 1939 to 1940 and earned approximately \$700. Since that time he has averaged about \$1500 a year. His maximum earnings from all sources in any year since that time was slightly under \$2800 of which a little less than \$2400 was from fishing and about \$400 from other laboring employment concerning which he testified. (Tr. pp. 1498-9.)

(b) The defendant Smith has earned both from his share as a working fisherman and his share as the owner of a boat from a minimum of \$800 to a maximum of about \$5,000 a year. He has averaged slightly less than \$2500 per year. In 1946, the year in which

he achieved his highest earnings, he earned about \$3800 for his share as a fisherman and around \$1300 or \$1400 for the boat share. During that year he spent about 8 months fishing and about 4 months working repairing the boat. The members of the crew who worked along with him spent the same amount of time fishing as he did and each earned \$3800, approximately, for which in addition they worked not more than 2 weeks repairing the boat. The defendant Smith received about \$1300 or \$1400 for approximately  $3\frac{1}{2}$  months work repairing the boat. If he had taken the boat to a contractor to have the repair work done, it would have cost him considerably in excess of \$1500. If the boat's share was credited to his time worked while repairing the boat, his earnings would have been less per day, per week and per month during that period than his earnings for the other 8 months, per day, per week and per month working as a fisherman. (Tr. pp. 1499-1500.)

(c) During the time that the defendant Sawyer owned a boat, he never made any money while working on it, he about broke even and received nothing for his labor. After he sold his boat, he went fishing for  $2\frac{1}{2}$  months on a share basis on another boat and during that period earned a total of about \$600.00. (Tr. p. 1500.)

(d) The defendant Phelps started fishing in 1934 and for the first few years thereafter did not earn in excess of \$1,000 a year for a full-time fishing effort. Since 1934 and up to the time of trial, he has never in any year earned in excess of the amount of \$2,000.

During these years, he fished on the average of 9 months a year, fulltime and spent about 2 or 3 months working on a boat, repairing the boat for which he received no extra compensation. He has no property except a little fishing gear, no car, no life insurance, no insurance on his boat (none of the fishermen are able to carry insurance on their boats because they are unable to afford it). (Tr. pp. 1663-4.)

(e) The defendant McComas first fished in 1942 and earned a little less than \$2,000. In 1943, his earnings were about \$1200, and 1944 about \$1800. (Tr. p. 1265.)

(f) The defendant McLauchlan lived in a trailer for most of the period that he was a fisherman, for which trailer he paid \$175. He was unable to obtain or afford a home in which to live. His entire other property is a 1937 Graham automobile. His earnings as a fisherman for the time that he has fished has averaged approximately \$100 a month, except for three or four months when his earnings averaged slightly in excess of \$125.00 a month. (Tr. p. 1665.)

(g) The most money that the defendant Munson made at any time since he started fishing was in the year 1946 when he netted \$2700. His average has been well under \$2,000 a year, probably closer to \$1500 than to \$2,000. He lives in a home which he purchased for a total price of \$2500 and on which he pays \$20.00 a month. (Tr. p. 1716.)

(h) The defendant Lackyard rents a home for \$20.00 a month. His wife works as a telephone

operator. His earnings in 1944 were about \$400, in 1945, about \$685, and in 1946, \$662. In 1943, his net income was also about \$400. (Tr. pp. 1719-20.)

(i) The defendant Arthur Hill rents a place in which he lives for \$17.50 a month. The last time that he went fishing was on a share basis and for a 2-week period he made \$21.50. Prior to that he fished on his own boat in November 1945, for about a week, got caught in a storm, lost his anchor and lost about \$30.00 on ice and groceries. Damages to his boat ran to about \$30.00 and he caught no fish. The time before that, he was out for about a week and made about \$50.00 above his expenses. In 1943, his net earnings were approximately \$2500.00; in 1944, \$750.00; in 1945, \$725.00; and in 1946, \$1500.00 (Tr. pp. 1717-18.)

3. At times when the price of fish to fishermen had dropped in one instance from 28¢ to 4¢ a pound, and in another instance from 16¢ to 2¢ a pound, each in a single day, a check of retail prices during those periods found the retail prices running 50¢ and over per pound, without any drop at all in retail prices at the time that there was this tremendous drop to the fishermen. (Tr. pp. 1718-19.)

During the trial on April 21, 1947, the defendants submitted a written offer of proof covering a number of matters.

Before unionization, the prices paid by the canneries, as well as by fresh market fish dealers, were subject to almost daily fluctuation, the prices varying as much as 500% within a period of one, or two, or

three days. However, at any given time of any given day, the prices paid by all dealers were the same. In addition, the prices paid by the canneries were extremely low. The price for top quality red salmon going as low as 2¢ per fish and the price for salmon as low as \$3.00 to \$3.50 per ton. It was common practice for dealers to patronize certain boats to the exclusion of others in return for a kick-back or special fee charged to the boat owner or crew. Short-weighting was common, open and notorious, including the practice of allowing an excessive flat weight for containers, resulting in the loss to the fishermen up to 15% of the total catch. As a result of these conditions, the fishermen up and down the coast, including the ports in the Southern California area were heavily in debt to the dealers and to the cannerys and were required to and did deliver all of their fish to the dealers or cannerys who were their creditors at whatever price was offered.

Conditions became particularly bad during the depression of the early 30's when the House Committee on Merchant Marine, Radio and Fisheries noted the comparison between the bad economic condition of the farmers and of fishermen, referring to them as being as badly in need of help as the farmers and as "the forgotten men in this country".

By 1936, after a number of years of organizational activity in the North Pacific, salmon prices had been raised more than 500%, the increased prices ranging from 10¢ per fish for pink to \$1.00 per fish for spring salmon.

In 1929, the average annual earnings for fishermen in the United States was about \$1,000.00. By 1931, this had fallen to \$630.00. In 1933 the average annual earnings of fishermen working on a share basis in California was \$847.30. However, as of that year, the small boat fisherman, averaged only about \$300.00.

Organization in the fishing industry on the Pacific Coast is known to have existed as early as 1886, when the Columbia River Fishermen's Union was organized at Astoria, Oregon, and was chartered by the American Federation of Labor. The first effort to obtain an agreement with relation to prices of which there is any available record was made in 1886. The first strike of which there is any record occurred on April 1, 1896, and was conducted by the Columbia River Fishermen's Association.

In 1902 about 700 fishermen working in Bristol Bay, Alaska, went on strike for higher earnings, demanding that their pay be raised to 3¢ per fish.

By 1904 the Fishermen's Protective Union of the Pacific Coast, which had become affiliated with the International Seamen's Union, had some 5,000 members. From that time on, various unions formed at various ports and continued in existence for varying periods of time.

From about 1900 on, there have continuously been price agreements covering all species of fish in the Columbia River areas and in Alaska, and contracts are now in full force and effect in these areas. Copies of such contracts are attached to the offer of proof.

Beginning in about 1936, the union in the Puget Sound area began bargaining for the price of fresh market fish, and contracts establishing prices have continuously been entered into, with all of the canneries and with all of the fresh fish dealers located in the Seattle-Puget Sound area, and such contracts are now in force and effect. Examples of such contracts are attached to the offer of proof.

In the Northern California area, collective bargaining price agreements have been entered into with the canneries and reduction plants continuously since 1936, covering all such canneries and plants, and are now in force.

Starting in 1938, contracts setting prices for fresh market fish have been negotiated and enforced in all ports in Northern California and Sacramento River with all of the fresh market fish dealers located in said area. Over 125 of such contracts are attached to the offer of proof.

All of these contracts were entered into with buyers by associations composed of working fishermen, some of whom were boatowners and some of whom were non-boatowners; the contracts deal with the prices for the sale of fish by members of the association to the contracting buyers.

At various times during the negotiation, the services the United States Department of Labor Conciliation Division have been utilized to aid when a dispute could not otherwise be settled. The same is true prior to 1942 of the Maritime Conciliation Serv-

ice, an agency of the United States Government, which specialized in the settlement of maritime labor disputes. During the war, many of the fishermen union disputes were taken to the National War Labor Board, which Board ruled that prices paid to fishermen, both boatowners, and non-boatowners, constituted wages. The War Labor Board in more than 12 cases set the price of fish in War Labor Board awards as wages of the working fisherman.

For many years, there has been in full force and effect a regulation of the Fish and Game Commission requiring that before a fisherman goes fishing, he must have an assured market, that is, a specific order for potential catch. Where there have been collective bargaining agreements, this order has been complied with. Where no such agreements have existed, all attempts by fishermen to get advance orders have been futile and fishermen have been forced to go out and make their catches in violation of this regulation or not go fishing at all. During the period from 1937 and 1938 to the time of trial, the annual harvest of fresh market fish in Seattle where there were collective bargaining agreements, increased about 15 times. In the same period in Northern California, where there were also collective bargaining agreements, the catch approximately doubled. During the same period when there have been no such agreements in the Southern California area, the catch of fresh market fish has remained approximately constant.

In April and May of 1943, there was a period when the price of barracuda paid by the dealers dropped



from approximately 20¢ per pound to 6¢ per pound and finally the dealers refused to take any barracuda at all. During that entire period, the retail establishments were selling barracuda at a price between 55¢ to 60¢ per pound and there was no reduction in the retail price. The Fishermen's Union called a conference in May of 1943 in which O.P.A. participated. Investigation revealed that even with the prices at which the retail markets were selling barracuda, they did not have sufficient barracuda to meet the demand. Following the barracuda conference the dealers agreed to pay the fishermen a price of 10¢ to 12¢ per pound for barracuda and simultaneously agreed to reduce their sale prices. The result was that the price to the fisherman increased and the price to the consumer went down to approximately 38¢ to 40¢ per pound.

During the year 1945, seven Los Angeles fresh fish dealers purchased \$479,896.00 worth of fish in the Southern California area and \$2,567,028.00 worth of fish was brought in from outside the Southern California area. For 1946, the same figures were respectively, \$605,670.00 and \$4,338,500.00. There are a total of 229 such dealers and the proportion of fish which these companies purchased from landings outside Southern California as compared with landings inside Southern California is approximately the same as set forth above. During the month of June, 1946, there was no unfilled demand for fresh fish in the Southern California area, and the same was true with regard to all areas in the five Western states. All orders that were obtained or could be obtained were

filled. There was no change in the normal or the usual supply of fish to consumers or to the overall wholesale market in the Southern California area, or any other area in the five Western states.

At no time during the years 1945 and 1946, did any dealer in any locality pay a price different from that paid by any other dealer in the same locality. When there were changes in the price paid by dealers, those changes were uniform as to all dealers purchasing fish. These price conditions and practices existed at all times prior to 1945 as well as during the years 1945 and 1946. While prices paid fishermen would drop as much as 500% in a single day, the increase to the fishermen never incurred in jumps of more than a cent or two a pound.

There is no relationship between the price paid to fishermen and the price which the dealer charges for the fish. Tremendous drops in prices paid to fishermen do not result in drops in prices charged by the dealer.

## Appendix H

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“Mr. Kenny. \* \* \* My first objection would be at line 8, ‘at which the association itself or as sales agent for its members.’ Now that clearly does not take into consideration the Stark County case and numerous other cases of bargaining cooperatives, where it is merely a cooperative agency. \* \* \*

Mr. Margolis: But they don’t have to sell the fish. They can bargain for the fish, the price at which the fish can be sold.

The Court. What is the difference?

Mr. Margolis. They are going to make a difference on it.

Mr. Kenny. That is what the Government is going to make a difference on. In other words, there are dozens, in every perishable commodity there are dozens of bargaining cooperatives. We have given you numerous citations to that effect. And it is a common practice, particularly in the perishable commodity field. At which the association itself sells the fish or negotiates for prices at which the members sell and deliver the fish.

The Court. Suppose at line 8, ‘at which the association itself or as sales agent for its members’, suppose we strike out and say ‘which provides for and fixes the prices at which the fish caught by the members of the association is sold to a buyer.’

Mr. Kenny. Good.

Mr. Rubin. I don’t think that is the law [101] your Honor please. I don’t think that a cooperative has

the power to do that. A cooperative either functions as a business organization or as a sales agent.

The Court. I leave 'sales agent' in there. \* \* \*

Mr. Margolis. One of the things, when you come right down to it there, I think it should read 'when formed for any such purpose' instead of 'for such purposes.'

Mr. Kenny. Any of such purposes?

Mr. Margolis. Because obviously it doesn't require them to collectively catch, collectively produce, collectively prepare for market, collectively process to collectively handle.

The Court. The statute uses it in the conjunctive.

Mr. Margolis. Yes, your Honor, but it is a permissive statute. It says they may do all of these things. If they do something less than the statute permits, that is all right. Otherwise then what it means is if they caught and marketed but did not process the act would not apply.'" (Tr. pp. 1853-58.)

## Appendix I

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### “Defendants’ Proposed Instruction No. 12

I instruct you that under a law of the United States, persons engaged in the fish industry, as fishermen, catching fish, may act together in collectively catching and marketing the fish caught, and may make and enter into all contracts necessary or desirable to accomplish such purposes.

I therefore instruct you that if you find that the Defendants, as members of the Defendant Union or Association acted or combined together for the purpose of catching fish, and acted or combined together for the purpose of procuring markets and market prices for fish caught by them, that such conduct, or acts or combination on the part of the Defendants, are permissible acts and not a violation of law, and you should therefore find the Defendants ‘Not Guilty.’

15 U.S.C.A. 521;

U. S. v. Dairy Co-Op., 49 Fed. S. 475;

Columbia River Packers v. Hinton, 34 Fed. S. 970, 977;

Liberty Warehouse Co. v. Burley Co-Op., 276

U. S. 71, 72 L. Ed. 473. (50).”

(Tr. p. 47.)

### “Instruction No. S-12.

I further instruct you that in order for the defendants to have the protection of the Fish Marketing Act, it is not necessary that they all act together in the

catching of the fish; it is sufficient under the law for the defendants to have the benefit of the Fish Marketing Act if they are members of an association which acts as a bargaining agent or sales representative for the fishermen and through which agent prices are negotiated and established.

Stark County Milk Products Assn. v. Tabeling,  
192 Ohio St. 159, 98 A.L.R. 1393;

Johnson v. Georgia-Caroline Retail Milk Pro-  
ducers Assn., 182 Ga. 695, 186 S. E. 824;

Hulbert—Legal Phases of Cooperative Asso-  
ciations, p. 119. (71)''

(Tr. pp. 59-60.)

“Instruction No. S-13.

I further instruct that in the Fish Marketing Act, to which reference has been made, the word ‘cooperative’ is not used; nor is it contemplated, nor is it required by the terms of the Fish Marketing Act for a group of persons such as fishermen to receive the benefit of the Act that they be a cooperative as that term is legally and generally understood; that it is sufficient for the fishermen to act together in the marketing or selling of their catches of fish.

15 U.S.C.A. 521. (72)''

(Tr. p. 60.)

Appendix J

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Senator Cummins said:

“I think combinations of farmers may be entered into for three general purposes: first, in order to lessen the cost of production. There are many ways in which combinations may be formed that will lessen the cost of production of whatever commodity the farmer may be engaged in producing. I think very worthy combinations may be entered into which will lessen the cost of marketing; that is, bringing the commodity to the place to which it is sold; and there certainly can be no objection whatever to any combination of that kind. There is not the slightest reason to believe that any combination to engage in lessening the cost of marketing—that is, in eliminating the middleman—could be found antagonistic to or in conflict with the antitrust law.

Combinations may also be formed, and, I think, ought to be permitted, having for their object the increase in the market price of the commodity. While that may be objectionable in some limited fields, recognizing, as I do, that the market price of farm products is generally below the cost of production, I do not object to combinations that have for their specific purpose the increase in the market value, so that the commodity may be sold at a fair and reasonable profit to those who produce them.”

## Appendix K

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“Section 6 of the Clayton Act was read to you by one of counsel. I will read it again.

‘The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock, or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.’

In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of the Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person.

Further in that connection the indictment charges that the defendant association Local 36, IFAWA, is in fact an association of independent businessmen engaged in the business of catching and selling fish for their own account and profit and that the members of Local 36 are not employees of the fish dealers. The



fact that said defendant association may refer to, act as, or call itself a labor union does not in and of itself make said association a labor union. An association of independent producers or of persons who are self-employed and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.

If you find as a fact that the membership of defendant Local 36, IFAWA, consists of persons who stand in the relationship of employees to the fish dealers, I charge you that the members of said association may join together and carry on acts to effect changes in the terms and conditions of their employment, even though their acts may affect or obstruct interstate or foreign commerce and that in doing so they would be pursuing a legitimate objective. They may, however, perform acts which affect or obstruct interstate or foreign commerce as a matter of law only if there is a labor dispute between the members of Local 36 and the parties against whom their acts are directed or intended to affect, in this case the fish dealers. Such a labor dispute, however, must affect the terms and conditions of employment of the members of Local 36 or the terms and conditions of their employment must be the matrix of any controversy or dispute you may find as a fact existed between the members of defendant association and the fish dealers.

If you find that there is a controversy between the members of Local 36 and the fish dealers and that con-

troversy is solely one over the price or terms and conditions at which the members of Local 36 shall sell their fish, and that such a controversy does not involve or affect an employer-employee relationship or is not the matrix of the controversy, then no labor dispute can be said to exist between the members of Local 36 and the fish dealers which would entitle the members of the Local 36 to combine together to restrain foreign and interstate trade and commerce in fresh fish as charged in the indictment, under Section 6 of the Clayton Act." (Tr. pp. 1943-45.)

## Appendix L

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“Mr. Margolis. First of all, our feeling about the thing is that this instruction is completely unnecessary because the question, as we see it, is not whether Local 36 is a labor union but whether Local 36 is composed of persons who are selling their labor, and if so, labor not being a commodity, whether you call it a labor union as that term is used is immaterial.

\*            \*            \*            \*            \*            \*

Mr. Margolis. We are pressing Section 6 and particularly that portion of Section 6 which talks about labor not being a commodity. The Hinton case was written with special reference to the Norris-La-Guardia Act in which it was absolutely necessary to determine whether or not the association was a labor union. That went to the very heart of the case. We are not claiming any exemption on that basis. We are relying on Section 6 of the Clayton Act, and this simply avoids that issue because the issue under Section 6 of the Clayton Act we are referring to is that labor is not a commodity.

\*            \*            \*            \*            \*            \*

Mr. Kenny. Well, now, the next sentence, it seems to me that that isn't the law, that is, there could be and are self-employed groups who are labor unions. Witness the Hearst v. NLRB decision.

It seems to me the Government has made its point by getting in the second sentence where it says 'the fact that said defendant association may refer to, act

as, or call itself a labor union does not in and of itself make said association a labor union,' but they are treading on ground that is not legally secure when they rule out self-employed persons from a labor union.

And, as I say, you have the newsboys case and you have the case of the Hard Rock Miners and others who are what they call leasers and to that extent self-employed but are labor unions. I think that the Government is asking for something here that just isn't the law.

\* \* \* \* \*

The Court. If I strike out that sentence and change the next sentence, 'An association of independent producers or of persons who are self-employed', and then change the 'or' to say, 'and who are engaged in business on and for their own account and profit, free from such controls as an employer ordinarily exercises over a person who is an employee, would not be a labor union.'

Mr. Kenny. That would be all right if you added the language which we have in No. 8.

The Court. I have No. 8 before me. Do you have it?

Mr. Kenny. Yes, the third paragraph of No. 8 says, 'Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor and the use of his own tools and where, as an individual,'—and this is the thing we need—'he lacks equal bargaining power in his dealing with those from whom his

livelihood is gained.' That is Justice Rutledge's language.

\* \* \* \* \*

Mr. Margolis. Of course, we think what should be added there, your Honor, in addition to standing in the relationship of employees to the fish dealers, 'or who are selling their labor.'

Mr. Kenny. Products of their labor.

The Court. No.

Mr. Margolis. Or the products of their labor. Either one of those two ought to go in.'" (Tr. pp. 1870-7.)

## Appendix M

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### “Defendants’ Proposed Instruction No. 18.

It is one of the contentions of the Defendants in this case that in essence they are workers, or laborers, selling their services and the use of their vessels and equipment, as fishermen, at wages to be determined at so many cents per pound for fish delivered.

If you should find as a fact that they are such type of workers, being compensated as mentioned, then I instruct you that no law of the United States prevents them from agreeing among themselves to set a price on the fish, and you must therefore find them ‘Not Guilty.’

*Hopkins v. U. S.*, 171 U. S. 578;

*Anderson v. U. S.*, 171 U. S. 604.”

(Tr. pp. 50-51.)

### “Instruction No. S-4.

You are instructed that the defendants here as a matter of law, are to be considered in the same category as agriculturists and horticulturists, and that agricultural and horticultural organizations instituted for purposes of mutual help and not having capital stock or conducted for profit are exempted from the operation of the anti-trust laws. Therefore, if you find that the defendants combined in an organization to sell the fish caught by them and did not include in their organization any persons other than fishermen

operating in the same manner that they did, you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2d Session, 1914, p. 46.)”

(Tr. pp. 53-54.)

“Instruction No. S-5.

I instruct you that a working producer is a person the basis of whose livelihood is his own labor or a person whose livelihood has his own labor as one of its chief factors. You are instructed that a working producer who joins solely with other similar working producers to fix the price of articles produced by them is not guilty of any violation of the anti-trust laws, and therefore, if you find the defendants are working producers who combined solely with other similar working producers for such purpose, you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2nd Session, 1914, p. 46.)”

(Tr. p. 54.)

“Instruction No. S-6.

Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combina-

tions or conspiracies in restraint of trade, under the anti-trust laws.

Such organizations are those where labor is the basis or one of the chief factors in the organizations, as in the case of labor organizations proper, and in agricultural and horticultural organizations. The reason for the exemption of these organizations from the operation of the anti-trust laws is because the labor of a human being is not a commodity or article of commerce.

Therefore, if you find that the defendants acted as members of an organization in which labor was the basis or one of the chief factors, they did not act in restraint of trade, and you must return a verdict of not guilty.

(15 U.S.C.A. Sec. 17, Sen. Rep. No. 698, 63rd Congress, 2nd Session, 1914, p. 46.)”  
(Tr. pp. 54-55.)

“Instruction No. S-10.

I further instruct you that one of the defenses of the defendants is that the organization to which they belong and through which they function, Local 36, is a trade or labor union, and therefore, the acts of the defendants are not subject to the penalties of the Sherman Act. If they are acting solely in self interest and not in collusion with other economic groups you should acquit the defendants.

In determining whether said Local 36, one of the defendants, is a trade or labor union, you are instructed that it is the policy of the law, in criminal



cases (and this is a criminal case) that wherever, from a given set of facts, it is reasonably possible for a jury to make a finding or determination of fact in favor of the defendant, it is the duty of the jury to so find. In other words, after considering the nature of the activities, and history of Local 36, if it is reasonably possible for you to conclude that it is a trade or labor union, and is acting solely in self interest and not in collusion with other economic groups it is your sworn duty to acquit the defendants.” (Tr. pp. 58-9.)

“Instruction No. S-14.

I further instruct you that under the laws of the State of California (and such laws are applicable in this Federal Court), fishermen catching fish acquire no title or ownership in the fish they catch. They merely acquire the right to use or dispose of the fish according to the laws of the State of California. These laws permit fishermen to take or catch fish and dispose of them as provided by law.

I therefore instruct you that the only right the fishermen acquire in the fisheries of this state is the right to use their labor and tools in the catching and taking of fish and to dispose of the fruits of their labor in accordance with the laws referred to.

I therefore further instruct you that the last mentioned matters should be considered with relation to one of the defenses of the defendants in this case which is that the principal or chief factor in their operations is labor expended in the taking or catch-

ing of fish and that in essence what they sell is their labor.

I therefore further instruct you that Section 6 of the Clayton Act, which has been referred to in this case, reads in part, as follows:

‘The labor of a human being is not a commodity or article of commerce \* \* \* nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws.’

I therefore further instruct you that if you find the activities and operations of the defendants consist of their labor as set forth in the quoted portion of the Clayton Act, then I instruct you that the actions of the defendants in entering into any alleged agreement regarding the sale of their fish under the facts of this case are not in violation of law.

People v. Stafford Packing Co., 193 Cal. 719, 725;

People v. Huvdon Co., 215 Cal. 54;

People v. Monterey Fish Products Co., 195 Cal. 557;

Santa Cruz Oil Co. v. Milnor, 55 Cal. App. (2d) 56;

15 U.S.C.A. 17.”

(Tr. pp. 60-62.)

“Instruction No. S-8.

An employee-employer relationship does not depend on the existence of a payroll providing for regular

compensation of workers at regularly-stated intervals. Such a relationship can also exist if the worker is paid for his services on a piece-work basis under which he is only paid as he delivers the article or piece which he has produced as the result of his labor and use of his own tools. Labor disputes may arise between such a piece worker and his employer.

A labor dispute may also arise between persons who, for other purposes, are technically independent contractors or businessmen and other persons, or groups of persons, who furnish the former the principal source of their livelihood.

“Such a circumstance legally exists where the so-called independent contractor or businessman gains his livelihood as the result of his own labor and the use of his own tools and where, as an individual, he lacks equal bargaining power in his dealings with those from whom his livelihood is gained.

Both piece workers and independent contractors or businessmen who find themselves in this economic position may lawfully join together in a labor union and, by collectively bargaining, seek to increase their compensation and better their working conditions.

If you find that the defendants are piece workers or independent contractors or businessmen, occupying the economic position I have just described to you, and if you further find that their activities as described in the indictment were confined to a combination among themselves (65) designed to improve

their own situation, then they have not violated the Sherman Act in any way and you must acquit.

Milk Wagon Drivers' Union v. Lake Valley  
Farm Products, 311 U. S. 91;

N.L.R.B. v. Hearst, 322 U. S. 111 at 127;

New Negro Alliance v. Sanitary Grocery Co.,  
303 U. S. 552;

U. S. v. Hutcheson, 312 U. S. 219."

(Tr. pp. 56-57.)

## Appendix N

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“13. I instruct you that if you find, under the facts of this case, that the defendants are the original producers of fish; and that none of their acts or agreements either contemplate or tend to restrict or interfere with competition of middlemen in or in the consumer market, you shall find the Defendants ‘Not Guilty.’ ” (Tr. p. 48.)

“14. I instruct you that the Sherman Anti-Trust Law does not apply to agreements for the sale of fish entered into between the original working producers of such fish. That the Sherman Anti-Trust Act does not apply to agreements between working fishermen, which agreements may have for their object the setting of prices for their catch. That the purpose of the Anti-Trust Act is to prevent agreements relating to the sale of commodities in interstate commerce after such commodities have entered the market. Therefore, if you find that the defendants, as original working producers of fish, entered into agreements regarding the selling of fish, but that such agreements had no effect upon the resale of such fish after the fish entered the market or channels of trade, then I instruct you that you should find all of the Defendants ‘Not Guilty.’

Sherman Act;

Clayton Act;

Philadelphia Rec. Co. v. Mfg. Asso., 63 Fed.  
S. 254, 261;

Anderson v. Shipowners Asso., 71 L. Ed. 298,  
302;

Hunt v. Crumboch, 89 L. Ed. 1954.”  
(Tr. pp. 48-49.)

“15. I further instruct you that working fishermen may agree among themselves for the sale of their catch, they therefore have the right to enter into contracts for the disposition or sale of their products when such products enter the first channels of trade.

U. S. v. Bay Area Painters Asso., 49 Fed. S.  
733.”

(Tr. p. 49.)

“16. I further instruct you that there is no evidence in this case, nor does the government contend, that the Defendant Union or its members sought to control the price of fish in the trading market. And further, that the Sherman Act does not prevent laborers, workers, fishermen or farmers from combining together for the purpose of procuring a price satisfactory to them for the fruits of their labor.

U. S. v. Dairy Co-Operative Assn., 49 Fed. S.  
475;

Hunt v. Crumboch, 89 L. Ed. 1954;

Allen Bradley case, *infra*.” (Tr. pp. 49-50.)

“17. If you find from the facts in this case that the purpose and objectives of the Defendant Union and its members was to assure them a reasonable return or price for the fish products caught by their labor, then I instruct you that their activities in demanding a written contract detailing prices to be

paid for the fish caught by their labor is not a combination or agreement in restraint of trade and you must therefore find the Defendants 'Not Guilty.'

Allen-Bradley v. Local Union, 325 U. S. 797;

U. S. v. Hutcheson, 312 U. S. 219;

Hunt v. Crumboch, 325 U. S. 821."

(Tr. p. 50.)

"18. It is one of the contentions of the Defendants in this case that in essence they are workers, or laborers, selling their services and the use of their vessels and equipment, as fishermen, at wages to be determined at so many cents per pound for fish delivered.

If you should find as a fact that they are such type of workers, being compensated as mentioned, then I instruct you that no law of the United States prevents them from agreeing among themselves to set a price on the fish, and you must therefore find them 'Not Guilty.'

Hopkins v. U. S., 171 U. S. 578;

Anderson v. U. S., 171 U. S. 604."

(Tr. pp. 50-51.)

"19. I further instruct you that in so far as the facts of this case are concerned it is not a violation of law for fishermen, original working producers of fish, to agree with each other to dispose of their catch at an agreed price, so long as the agreement does not affect the right of any fisherman, who is a party to the agreement, to engage in the fishing industry and dispose of his catch as advantageously as the others may do.

Therefore, if you find from the facts of this case, and it is not disputed, that it was not the intention of the defendants to limit in any way the fishing activities of any fisherman in the agreement, then you must find all of the Defendants 'Not Guilty.'

Standard Oil v. U. S., 55 L. Ed. 619, 641-43."  
(Tr. p. 51.)



Appendix O

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*Minnesota Wheat Growers' Co-op. M. Ass'n. v. Higgins*, 203 N.W. 420 (Minn. 1925):

“There is no justification for the suggestion that an orderly, systematized, co-operative marketing authorized by law, to prevent a sacrifice of the farmers' products and to realize a reasonable profit, has any analogy to financial combinations in restraint of trade, which have at times tended to prevent the farmer from realizing a fair profit and a decent living. In fact, this co-operative measure may have more tendency to avoid monopolies by others than it does to create a monopoly by the limited number of farmers who will join it.” (p. 423.)

“The association frees the market, makes it more open, less one-sided, less subject to manipulation and monopoly control on the part of those who deal in the commodities. It aids and harmonizes with this constitutional provision, which is aimed at those who hoard and speculate in food products, and who interfere arbitrarily and artificially with the natural flow of commerce in such products. It offers a plan as a basis for hope that the market may be stabilized and protected from fluctuation in price, which, in practice, is detrimental to the producer and of little benefit to the public.” (p. 422.)

“Under similar statutes, where questions have been raised, it has been generally held that an organization of this character is not an unreasonable combination

in restraint of trade.” (Citing numerous decisions.) (p. 423.)

*Tobacco Growers’ Co-Op. Ass’n. v. Jones*, 117 S. E. 174 (N. C. 1923):

“An examination of this statute shows, we think, that this association is authorized for the purpose, not of creating a monopoly, but to protect the tobacco producers against oppression by a combination of those who buy, and not to authorize, and does not empower, those who produce the raw material to create a monopoly in themselves. \* \* \* The sole object of the association is to protect the producer of the raw article from depression in the price by the combination of the large manufacturing corporations, controlled by a few men who can at the same time not only decrease the price to the producer, but can increase it at will to the consumer, and thereby accumulate in a few hands sums beyond computation. The co-operative association purposes to eliminate unnecessary expenses in selling and to prevent artificially forced reduction in the price paid to the producers. Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacture, and by the extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it.” (p. 178.)

“The co-operative marketing system was forced into existence to guarantee fair prices to the producer, a

fair wage for labor, and to prevent extortion upon the consumer. It increased consumption, by furnishing the consumer a regular supply at less price, and at the same time enabled the laborer and the farmer to obtain a remunerative return. In addition, the co-operative system eliminated unnecessary expenses and costs, as well as the enormous speculative profits realized by combinations which had taken control of the entire process between the producer and the consumer. \* \* \*

There is no analogy between the proceedings to dissolve the great trusts which have benefited by this system, as in the Standard Oil and American Tobacco Cases and others, and these associations for the protection of the producers of cotton, tobacco, and peanuts, to market and to create facilities by which their crops will be placed upon the market gradually as called for, and not dumped into the hands of great financial associations at a financial sacrifice to the producers to be resold or manufactured at great profit. It is an entire misunderstanding of the facts to assert that an orderly, systematized co-operation among the producers to prevent a sacrifice of their products and to realize a living wage for the laborer and a reasonable profit for the producers has any analogy to the system by which great combinations of capital have prevented the laborer and the farmer alike from realizing a reasonable reward and a decent living.” (p. 179.)

*Dark Tobacco Growers' Co-op. Ass'n. et al.*  
*v. Dunn, et al.*, 266 S. W. 308 (Tenn. 1924):

“Giving the act full faith and credit, and taking into consideration the history of co-operative associations, it appears that the purpose is to reduce rather than increase the price paid by the consumer, and thereby create a demand for larger quantities of farm products. The object sought is an increased return to the producer by eliminating speculation and waste, obviating dumping, reducing freight rates, marketing in an orderly and economic manner, making the distribution of agricultural products between producer and consumer as direct as can be efficiently done, studying marketing problems from the standpoint of the consumer, and creating new markets.

Statistics show that the price paid by the consumer for farm products is sufficiently high, but that the producer receives only 35 per cent. of this sum, the middleman (so to speak) receiving 65 per cent. One of the main objects of the association is to bring about a more just apportionment of the price paid by the consumer. The righteousness of this claim on the part of the producer is generally conceded.

Economists agree that the farmer can only obtain a fair price for his produce by group marketing or co-operation. By co-operation the per capita consumption of California oranges in America was doubled in 16 years. This was accomplished by proper grading, packing, orderly marketing, and by extensive advertising. The California Fruit Growers' Exchange spent for advertising last year \$875,000. But for co-

operation increased consumption by means of advertising would have been impossible. By co-operation \$3,000 a year in freight was saved, and the total cost of selling and advertising for 1923 amounted to but 2.49 per cent. of the value of delivered fruit.” (p. 309.)

“In our opinion, the classification of farmers into co-operative associations for the purposes set forth in the act is reasonable and natural, and one that should prove beneficial rather than detrimental to the public.” (p. 311.)

*Potter v. Dark Tobacco Growers' Co-op. Ass'n.,*  
257 S. W. 33 (Ky. 1923):

“The fact that other productive groups can, do, and for many years have marketed their wares as groups, and not as individuals, and that they are and have been enabled through group organization or ‘gentlemen agreements’ to regulate the distribution and stabilize the prices of their products, is a fact known of all men, which can neither be denied nor blinked by the courts; as is also the fact that farmers, if unorganized, necessarily act as individuals and not as groups in marketing their products, resulting in ‘dumping’ by the farmers, distribution by speculators, an unconscionable and uneconomic spread between producer and consumer in the necessities of life, and an inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen.

With a clear recognition of this fact borne in upon the public conscience by the threatened economic col-

lapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakably demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good." (p. 35.)

*List v. Burley Tobacco Growers' Co-op. Ass'n.*,  
151 N. E. 471 (Ohio 1926):

"In determining whether co-operative associations organized for the purpose of marketing agricultural products are such a favored class as to be within the inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in any commercial enterprise, and we should further look to the fact that many of them are very small producers of such limited means that they must market their products immediately after harvesting, and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities." (p. 480.)

*Brock v. Hardie, Sheriff, et al.*, 154 So. 690  
(Fla. 1934):

"At common law, monopolies were considered odious and inimical to public welfare. Whether created by governmental grant or by acts of private parties, persons, or corporations, their purpose is to

produce a situation or condition of trade and commerce inimical to the general welfare in the suppression of competition and the deprivation of many persons of their means of livelihood to the advantage and individual financial gain of the persons creating the monopoly. Those combinations are commonly called trusts.

The purpose of co-operative marketing associations is different. Their design is to promote industries, conserve the interests of the producers of the commodities, and secure markets for the produce to the end that the consumers may obtain such commodities at reasonable prices while the producer obtains a fair and reasonable return upon his investment and activities. Their existence is founded upon an economical necessity. Artificial scarcity of commodities is not designed to be produced nor to unreasonably increase the cost of the articles produced but on the contrary to serve a useful and needed service to the community and producer in making provision for a liberal supply and the prevention of a flooding of the market.

41 C. J. 166.

Such organizations have generally been held to be valid and not in conflict with laws against unlawful combinations in restraint of trade nor in violation of equal protection and due process clauses of the Federal Constitution. (Citing cases.)

While industrial co-operative marketing societies may be subject to the laws concerning combinations and contracts in restraint of trade, they have been, to the extent of the commodities and activities mentioned

in the exempting statutes heretofore mentioned, exempted from the operation of those laws.

The conclusion we reach therefore is that the anti-trust statute of this state is not rendered invalid by the alleged illegal discrimination in favor of the commodities handled by or produced by the co-operative marketing associations nor by the exemption of such associations from the operation of the act." (p. 696.)

See also:

*U. S. v. Dairy Coop. Ass'n* (McCalber), 49 F. Sup. 475;

*Kansas Wheat Growers v. Charlet*, 118 Kan. 765, 236 Pac. 657;

*Liberty Warehouse v. Burley Tobacco Soc.*, 271 S. W. 695 (Ky. 1925);

*Dark Tobacco Growers v. Mason*, 263 S. W. 60 (Tenn. 1924);

*So. Carolina Cotton Growers v. English*, 133 S. E. 542;

*Louisiana Farm Bureau v. Bacon*, 164 La. 126, 113 So. 790, approving 107 So. 115;

*Kansas Wheat Growers v. Oden*, 124 Kan. 179, 257 Pac. 975. See 279 U. S. 435, 80 L. Ed. 781, 73 Fed. 787;

*Kansas Wheat Growers v. Rowan*, 123 Kan. 169, 254 Pac. 326;

*Lennox v. Texas Cotton*, 55 S. W. (2d) 543;

*Kansas Wheat Growers Ass'n. v. Schulte*, 216 Pac. 311 (Kan. 1923);

*Ex parte Baldwin Co. v. Producers Corp.*, 203 Ala. 345, 83 So. 69;



- Anaheim Citrus Fruit Ass'n. v. Yeoman*, 51  
Cal. App. 759, 197 Pac. 959;  
*Railroad v. Tobacco Co.*, 147 Ky. 22, 143 S. W.  
1040;  
*Casterland Milk Co. v. Shewtz*, 179 N.Y.S. 131;  
*California Raisin Growers v. Abbott*, 160 Cal.  
601, 117 Pac. 767;  
*Dark Tobacco Growers v. Robertson*, 150 N. E.  
106.

## Appendix P

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The defendants stated their objections as follows:

“Mr. Margolis. To begin with, your Honor, we object to the whole instruction. \* \* \*

Mr. Margolis. We want to object to this also on the ground that it is an incorrect statement of the law, that the Socony-Vacuum Oil case, on which it is based, applies only to situations where there is a sort of combination which has a tendency to affect consumer prices, and also that it applies only to combinations in which there is something more than a mere agreement with regard to prices, but there are artificial means, such as buying up and keeping products off the market, which artificially raises and maintains the price to the consumer and does not apply to a situation where competition remains in the market by virtue of competition with other products and the price to the consumer is not necessarily affected.

We also want to object to this instruction on the same ground as we objected to Instruction No. 1, that it practically throws out the defense of the Fishermen's Marketing Act and of the Clayton Act, Section 6 of the Clayton Act which we have referred to. And also as to this particular objection, it should at least state that if you find these facts alone and no other facts, and that leaving that out makes the instruction incorrect upon the second ground of objection.

Mr. Kenny. Furthermore, I have one other point, and that is, that the words ‘market prices’ as used in

line 16 means, in the Socony-Vacuum case, maximum prices to consumers and not market prices to those who buy for resale, and market prices as it stands here undefined simply cannot be understood by the jury."

"Mr. Margolis. \* \* \* It is our contention that the rule of reason does apply to this sort of a situation, and our previous argument with regard to the Socony-Vacuum Oil Company case applying to consumer prices and situations, which we have previously defined, and not to the situation here, is hereby incorporated by reference in our objections." (Tr. 1850-52, 1916-17.)

Appendix Q

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“Defendants’ Proposed Instruction No. 6.

As to Rule of Reason.

I instruct you that the Anti-Trust Act does not forbid or restrain the power to make normal or usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, the term ‘restraint of trade’ should be given a meaning which would not destroy the right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce. Therefore, if you find from the facts of this case, that the agreement or contract, or combination, or conspiracy which the Government contends was entered into between the Defendants, was an agreement which reasonably may be considered as a normal or usual agreement for the marketing of their products, then you should find the defendants Not Guilty.

U. S. v. American Tobacco Co., 55 L. Ed. 663, 694;

Standard Oil v. U. S., 55 L. Ed. 619 (43).”  
(Tr. pp. 42-43.)

“Defendants’ Proposed Instruction No. 8.

I further instruct that if you find the agreement, combination or so-called conspiracy with which the defendants are charged, to be reasonable, in view of all of its considerations, then and in that event, I instruct you to find all of the defendants Not Guilty.

In determining whether the agreement is reasonable you are to be governed, at least in part, by the following factors:

1. The Fish & Game laws of the State of California which prohibit waste of fish.

2. The same laws, which require all fish caught to be marketed or used.

3. The same laws, which require fishermen to have bona fide orders for the sale of fish before they are caught.

4. The fact that under such laws, in order to procure orders for sale or delivery of fish to be caught, whether it is reasonable for the fishermen to insist upon a price in advance of embarking on the fishing voyage.

5. Whether it is a fair, sensible and reasonable practice for the Defendants to insist in advance for prices to be set for their catch of fish.

6. Whether it is reasonable for fishermen, whose labor is rewarded by the price at which their catch is sold, to know and determine in advance the basis, or rate, at which they will be compensated.

7. Whether they intended to restrain any sale of fish caught by them, or either of them.

8. The fact that they are not accused of endeavoring to set the resale or consumer price of fish by concert of action with the wholesale buyers or dealers in fish.

9. That one of the purposes and objects of the fishermen is to prevent the decline in fish prices to a point where commercial fishing would not pay them a fair return for their labor.

10. That by setting prices in advance, and at a price considered (45) by them to be fair and reasonable as a return on their labor, the defendants endeavor to stabilize the entire industry.

11. Whether the defendants sought to limit production of fish, or sought to increase the production and procure greater markets for and consumption of fish.

Appalachian Coal v. U. S., 77 L. Ed. 825;  
 Standard Oil v. U. S., 221 U. S. 1;  
 U. S. v. American Tobacco, 221 U. S. 106.”  
 (Tr. pp. 44-45.)

“Instruction No. S-16.

In considering the question as to whether the activities of defendants have been unreasonably in restraint of trade, I instruct you that the purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest; to afford protection from monopolistic tendencies and combinations. The restrictions imposed by the Sherman Anti-Trust Act are not mechanical or artificial. Its general phrases and language, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. These phrases call for vigilance in the detection and frustration of all efforts unduly or

unreasonably to restrain the free course of interstate commerce; but they do not seek to establish a more delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis. The law has established that only such contracts and combinations are within the prohibition of the Act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interest by undue restriction, combination or unduly obstructing the course of trade. The question of application of the statute to any business practice is one of intent and effect and is not to be determined by arbitrary assumption. It is, therefore, necessary in this case to consider the economic conditions peculiar to fish catching and marketing; the practices which have existed; the nature of the defendants' methods, problems and difficulties in selling their catches; and the reasons which led the defendants to adopting the method of selling their catch and the probable consequences of carrying out that plan in relation to market prices and other (75) matters affecting the public interest insofar as the catching, sales and consumption of fish affect that public interest.

Appalachian Coals v. U. S., 288 U. S. 344.”  
(Tr. pp. 62-63.)

“Defendants’ Proposed Instruction No. S-17.

I further instruct you that in enacting the Sherman Anti-Trust Act the evil sought to be eliminated was the bad effect upon interstate commerce which had been caused by monopolists agreeing among themselves to increase prices to consumers, and Congress felt that in artificially increasing such consumer prices such artificial prices would lessen the flow of interstate commerce. But it is the effect upon consumer prices which the Sherman Act sought to eliminate and therefore an agreement relating to prices must be an agreement which would tend to, or have an effect upon, consumer prices in order to be a crime under the Sherman Anti-Trust Act.

Therefore, if you find from the evidence in this case that there was an agreement among the defendants to set the prices of the fish they sold to the fish dealers or fish markets but that said agreement would not tend to, or have an effect upon, consumer prices, then I instruct you that such an agreement is not a crime or violative of the Sherman Anti-Trust Act.

Standard Oil Co. v. U. S., supra;

Socony-Vacuum Oil Co. v. U. S., supra.”

(Tr. pp. 63-64.)



Appendix R

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*United States v. Hutcheson*, 312 U. S. 219, 85  
L. Ed. 789:

“The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the ‘public policy of the United States’ in regard to the industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex Printing Press Co. case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct. \* \* \* It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters

far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 391, 83 L. ed. 784, 789, 59 S. Ct. 516, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' *Johnson v. United States* (CCA 1st), 163 F. 30, 32, 18 LRA (NS) 1194, 2 Am. Bankr. Rep. 724.

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary."

## Appendix S

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That this is so has been established specifically in this case by the fact that fish shipped in from other areas where price stabilization agreements between fishermen associations and dealers have existed for many years, competes so easily with locally caught fish that a much larger volume is shipped in to the area than is caught in Southern California. In fact, during the period that the price agreements have been in effect in the other areas and such agreements have not been in effect in the Southern California area, the production of fish has increased at an amazing rate in the areas where the agreements exist and has remained practically static in the Southern California area. If price stabilization agreements between fishermen and dealers tended to increase the prices charged by the dealers, the necessary effect would have been the reduction of the catch in the areas where the agreements existed and the increase of the catch in the areas where there were none—the exact opposite of what actually happened.

As to the effect upon consumer prices, records kept by the State Fish and Wildlife Service between the years, 1933, 1940 and 1944, of which this Court can take judicial notice, establish the validity of defendants' position. For example, in 1933 the fishermen received four cents per pound for sole and the average retail price was eighteen cents, a markup of fourteen cents. In 1940 the fishermen received three cents and the consumer continued to pay eighteen, a markup of

fifteen cents. In 1945 the price to fishermen was five cents, one cent higher than it had been in 1933 and two cents higher than in 1940. The retail price, however, went from eighteen cents to forty-nine cents per pound, a jump of thirty-one cents. That there is no real relationship between the price which is paid to the fishermen and the price which the consuming public pays for the fish is illustrated by all of the records of that Service. The fact is that the price which is paid for fish, as shown by charts in the various reports of the Service, follows very closely the price of protein foods such as meat, cheese, etc., regardless of the price that the fisherman happens to be getting for his catch.

Appendix T

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“The conclusion is irresistible that defendants’ purpose was not merely to raise the spot market prices but, as the real and ultimate end, *to raise the price of gasoline in their sales to jobbers and consumers* in the Mid-Western area. \* \* \* In essence the raising and maintenance of the spot market prices were but the means adopted for *raising and maintaining prices to jobbers and consumers*. \* \* \* There was also ample evidence that the spot market prices *substantially affected the retail prices* in the Mid-Western area during the indictment period. As we have seen, Standard of Indiana was known during this period as *the price or market leader* throughout this area. It was customary for the retailers to follow Standard’s *posted retail prices*, which had as their original base the Mid-Continent spot market price. \* \* \* *Retail prices* in the Midwestern area kept close step with Mid-Continent spot market prices during 1935 and 1936, though there was a short lag between advances in the spot market prices and the *consequent rises in retail prices*. \* \* \* In sum, *the contours of the retail prices conformed in general to those of the tank car spot markets*. The movements of the two were not just somewhat comparable; they were strikingly similar. *Irrespective of whether the tank car spot market prices controlled the retail prices* in this area, there was substantial competent evidence that *they influenced them—substantially and effectively*. And in this connection it will be recalled that when the

buying program was formulated it was in part predicated on the proposition that a firm tank car market was necessary for *a stabilization of the retail markets.* \* \* \* *Prices rose and jobbers and consumers in the Mid-Western area paid more for their gasoline than they would have paid but for the conspiracy.*” 310 U. S. 190, 191, 198, 199, 200, 220; 84 L. ed. 1151, 1155-56, 1166.

## Appendix U

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It has been recognized time and time again in governmental reports and in Congressional debates that the position of a fisherman is a peculiarly helpless one. It has been compared to that of a farmer whose crops are subject to changes in weather, as well as numerous other uncertainties. In this respect the fisherman is even more helpless. He has no control whatsoever over supplies. He can not choose to plant 20 acres instead of 40 acres, or 40 acres instead of 20 acres. The supply of fish is controlled entirely by natural causes about which, unfortunately, very little is known. Although both the farmer and fishermen deal with perishable products, the fisherman is even more helpless than the farmer in this regard. He has no opportunity whatsoever to withhold his catch from the market for the purpose of obtaining a reasonable price. The Court can take judicial note that during bad times farmers often destroy crops or permit them to rot on the trees or in the ground in order to prevent the supply on the market from becoming so great that the price is driven down even below existing depressed levels. The fisherman can not do this; he must sell his catch or he violates the law. True, if there is too great a supply of fish, the fisherman does not have to go out and can simply allow the fish to remain in the ocean. However, generally speaking, when the fisherman goes out to make his catch, he has no way of knowing how much fish either he will bring in or the other fishermen who go out will bring in. He

has no way of knowing what the supply is. All he can do is go out and if he finds the fish available catch as many as he can, at the same time that other fishermen are doing the same thing, and when he returns he must face the conditions as they are and dispose of his fish at whatever price is offered under those conditions. The dealer, on the other hand, buys at the depressed prices, holds the fish for demand and gets continuously stable prices throughout the year. In a report made by Mr. L. C. Salter, fishery economist of the United States Department of Commerce, Bureau of Fisheries, in 1937, the following appears:

“The fisherman is dependent upon seasonal fluctuations in the production of fish which is further affected by the elements of weather. Fish, especially certain species of edible fish for the fresh market, move in large runs or schools. Fishermen know that the fish must be caught when and where they are found. Consequently at times greater quantities of fish are caught in limited areas and in brief periods.”

The State of California has recognized the problems created for the processor by reason of the variations in supply of fish and has enacted legislation dealing with the subject. Thus in the case of *People v. Monterey Fish Products Co.*, 195 Cal. 557, the Court said:

“\* \* \* It is to the interest of the people of the state that the packing plants engaged in the packing and preparing of fish for human consumption shall be operated efficiently and economically, so that the price of their product to



the consumer thereof may be kept down. A packing plant can be operated most efficiently and economically when it is enabled to operate steadily at a constant rate of output approaching its maximum capacity. But when the fishermen start out to make a catch no one can foretell with exactitude the size of the catch which they will take. Therefore, in order to insure so far as practicable that the catch for each day shall approximate the capacity of the packing plant the act provides that the fish and game commission may, after a hearing, give the packer a permit which will enable him to engage for the taking of a specified quantity of fish in excess of his packing capacity, and upon occasions when such excess quantity is brought in to use the same for reduction purposes."

If the processors are to be allowed to deal reasonably with their problems arising out of the variation in supply of fish, is it not reasonable that fishermen should be allowed to combine to solve similar problems?

Appendix V

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“As a matter of law, persons engaged in the business of catching fish for sale and profit may act together in an association in collectively catching, producing, preparing for market, processing, handling and marketing of the fish caught by their members. When formed for such purposes, such an association may, on behalf of its members, enter into a contract with a buyer of fish which provides for and fixes the price at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer. *Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto.* I charge you that if you find as a fact that the defendant association is the type of association before described, *any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association or its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish under the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade.*

“Evidence has been admitted in the case of picketing and boycotting. These acts in and of themselves are not contrary to or in violation of any law. *They are to be considered by you as evidence in your determination as to whether the defendants did or did not combine or conspire as alleged in the indictment.* If you find that the defendants did not so combine or conspire, then you should acquit the defendants.” (Tr. pp. 1942-43.)

## Appendix W

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“I further instruct you that the only matter or facts you may consider in this case must be limited to the so-called agreement between the defendants which the government contends is in restraint of trade—that is, whether under the facts covered by the agreement, the agreement is in unreasonable restraint of trade. You are therefore to disregard any and all evidence in the case relating to such things as strikes, boycotts, picketing, etc. except in so far as those acts may tend to establish the fact of the defendants entering into or seeking to enter into an agreement to procure certain prices for the fish caught by the labor of the defendants. In other words the law is not concerned with any means used by the Defendants, but is only concerned with whether the agreement itself is in unreasonable restraint of trade.” (Tr. pp. 45-46.)

“You have been advised that all of the defendants claim (among other defenses) to have been operating under the terms and protection of the Fishery Marketing Act, a law of the United States.

If you find that their activities come within the meaning of that Act, then you must find the defendants Not Guilty.

In determining whether the activities of the defendants come within the meaning of such Act, you are instructed that it is the policy of the law, in criminal cases, that wherever, from a given set of facts, it is reasonably possible for a jury to conclude that such

acts are within the law, it is the duty of the jury to so find. In other words after considering the nature of the agreement entered into by the defendants, and bearing in mind the terms of the Fishery Marketing Act as heretofore explained to you, if it is reasonably possible for you to conclude that the Acts of the defendants have the protection of such Act, it is your duty to so find and acquit the defendants.

In considering this question, you should ignore the evidence relating to picketing, boycotting, interstate commerce and strikes." (Tr. pp. 55-56.)

"I further instruct you that evidence of coercive methods and tactics such as boycotting and picketing was only admitted for the limited purpose of showing the participation of the various individual defendants in seeking to obtain a price-fixing contract. It is the contract alone that determines the legality or illegality of the acts of the defendants under the conspiracy alleged in the indictment. If you find that the contract proposed by the fishermen to the fish dealers (Government's Exhibit No. 3) is one which they were legally permitted to enter into, then you must disregard the evidence of boycotting and picketing for any purpose and find the defendants not guilty." (Tr. p. 58.)

## Appendix X

## Testimony of Arthur Webster Ross.

“Q. When were the pickets withdrawn, Mr. Ross, to your knowledge?

A. By July 1st.

Q. Now, then, from May 29th to July 1st, apart from those two days, did the Railway Express Agency unload any fish on the wharf of the fish pier at San Pedro?

Mr. Garrett. One moment, please. Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any of the issues in this case.

\* \* \* \* \*

Mr. Andersen. The objection is that this matter relating to picketing is incompetent, irrelevant, has nothing to do with the matter charged in the indictment, and we would like to argue the point, may it please the court.

\* \* \* \* \*

The Court. The objection will be overruled. The objection made both by Mr. Garrett and by Mr. Andersen will be overruled.

Mr. Garrett. May I state, if your Honor please, my objection is not based upon the general proposition but what I believe to be the lack of causal connection shown by the foundation.

The Court. I think I understand it.

Those objections are both overruled.” (Tr. pp. 162-63.)

\* \* \* \* \*

“Q. What did Mr. Zafran say to you? Can you recall his words or the substance of what he said to you? Mr. Zafran said to you as follows. Now what follows, if anything?

A. You can sell and deliver through the Railway Express or whatever means we will have to get rid of it, by truck, during May 31, which was Friday, and June 1st, which was a Saturday. That gave us a chance to clean up all fresh fish so that we would not have any loss.

Q. Was any conversation had between yourself and Mr. Zafran as to any other fish that would come in on either the landward or the seaward side?

A. After that we could not ship.

\* \* \* \* \*

Q. What were the words, not the identical words because probably you may not be able to remember them, but what was the substance of the words that Mr. Zafran used to you that morning, if anything, with respect to additional fish coming in or going out?

A. No fish would be permitted to come in on the seaward side or on the land side after Saturday, June 1st.

Q. All right. Did you say anything to him after he said that to you?

Mr. Andersen. Same objection runs to this line of testimony, your Honor.

The Court. Overruled.” (Tr. p. 166.)

“Q. (by Mr. Schwartz). I show you Government’s Exhibit No. 1, and ask you whether you saw the people walking around as is portrayed in the exhibit.

Mr. Margolis. May we have a general objection—

Mr. Schwartz. Just a minute.

Q. (by Mr. Schwartz). —as you have just described in your previous answer?

Mr. Margolis. May we have a general objection to this line of questioning?

The Court. Surely. It will be deemed that the defendants have objected to each and every question on the grounds heretofore indicated concerning this line of testimony from this witness, and the objection is overruled.

Q. (by Mr. Schwartz). Go ahead, Mr. Vitalich.

A. Yes, I saw men walking up and down with similar placards, and I won't swear it was all these men the same day, some of these faces were familiar either that day or for about a month.

Q. For about a month.

A. For about a month. I saw these men either one day one group, maybe next day there would be another group; but these faces are familiar, some of them I recognize that I saw them at the place at the strike." (Tr. p. 314.)

"Q. Do you recall what day that was or what date?

A. It was about the first or second day after we discovered there were pickets on the truck side, and about the first or second day I saw this boat with an 'unfair' sign on top." (Tr. p. 316.)

#### **Testimony of John Louis Di Massa.**

"Q. Do you recall anything unusual at your place of business on that day?



A. Pickets in front of the market and a picket boat on the water-front side.

Mr. Margolis. If your Honor please, I move to strike the testimony on the ground it is incompetent, irrelevant and immaterial, no relation to any issue in this case; and ask that we may have a standing objection to this line of questioning with this witness.

The Court. Motion is denied, and the objection will be deemed to have been made to each and every question on this line, without its repetition, with the same ruling by the court.

Q. (by Mr. Schwartz). Now you mentioned something about pickets in front of the place. Will you describe what you saw?

A. There was about 10 or 15 men carrying banners, demanding a living wage, something to that effect, no price, no fish, no contract, no fish—something like that. It was quite obvious the place was being picketed.

Q. It was what?

A. It was obvious the place was being picketed.”  
(Tr. p. 397.)

“A. They were off the dock, they were on the road which our trucks travel to go back onto the dock.

Q. They were on the street, the road?

A. Yes, sir.

Q. Did they do their picketing as you have described on that side or did they also go on the other side of the dock, on the seaward side?

A. They had a boat on the water in the harbor.

Q. I am talking now about these pickets that you described carrying these banners.

A. On the dock, no. I didn't see any.

Q. The ones that you saw—

A. Were on the streets and the picket both."

(Tr. p. 398.)

"Mr. Margolis. I would like to make a suggestion that may be acceptable to the court and to counsel for the government. As has been indicated, we do object to all testimony concerning boycotting, picketing, and other economic activities in connection with the obtaining of this agreement. We know what the court's rulings have been, and our objections have been made simply for the purpose of preserving our record.

The Court. I understand.

Mr. Margolis. We would be perfectly satisfied if we had a running objection to that entire line of testimony, to not continue making those objections and take up the time of the court. We know what the ruling of the court is going to be; we don't wish to argue it any further. It seems to us it would save time.

The Court. I think that should be agreeable. I don't think counsel should be under necessity of stating their objection each time, if some stipulation can be framed to protect the record in that respect. It is certainly agreeable to me." (Tr. pp. 406-7.)

## Appendix Y

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“Q. (by Mr. Margolis). I show you a document, a photostatic copy of a document which has been marked Defendants’ Exhibit O for Identification, which purports to be a copy of a letter on the letter-head of International Fishermen and (2558) Allied Workers of America, dated June 5, 1944, addressed to All Southern California Fish Dealers, and ask you whether that is the letter you just referred to.

A. ‘This is.’ (Tr. 2559.)

“Mr. Margolis. At this time we offer Defendants’ Exhibit O for identification in evidence.

\* \* \* \* \*

The Court. He said this is offered for a limited purpose. Didn’t you?

Mr. Margolis. I said it was offered for the purpose of showing the kind of an organization this was through its activity. Not that the statements in there are true, but that this is what they were saying and doing at the time.” (Tr. p. 2560.)

“The Court. It is immaterial. Objection sustained.” (Tr. p. 1295.)

**Appendix Z**

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“Mr. Dixon. Now the objection is made, your Honor.

The Court. And the ground?

Mr. Dixon. On the ground it is immaterial and self-serving, particularly portions thereof.

Mr. Margolis. Any activity, I assume is self-serving.

Mr. Dixon. As I understand it, your Honor, the purpose of this line of testimony is to show the nature of this organization as an aid to the jury in determining what kind of an organization it is. I submit that this kind of a document does not help in any way on that basis and therefore is wholly immaterial.” (Tr. p. 2579.)

“Mr. Margolis. We can show what it was by what it said and did. This is the way the local acted. It didn’t act by digging ditches. This is what it did.

The Court. Objection sustained.” (Tr. p. 1302.)

**Appendix AA**

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“Mr. Margolis. I offer the letter in evidence as Defendants’ Exhibit Q.

Mr. Dixon. I now object, if my previous objection has been premature.

\* \* \* \* \*

The Court. Objection sustained.” (Tr. p. 1305.)

**Appendix BB**

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With respect to these documents, the record shows:

“Mr. Rubin. We object, if your Honor please, on the ground that they are incompetent, irrelevant and immaterial.

\*           \*           \*           \*           \*           \*           \*

The Court. Objection sustained.” (Tr. p. 1361.)

Appendix CC

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“Mr. Rubin. \* \* \* Your Honor will recall, and the record so indicates, at the time Government’s Exhibit No. 6 was admitted into evidence, an objection was made that that was not the best evidence and that the best evidence was the original books from which those original compilations were made.

Your Honor at that time ordered that the books be brought in court for the purpose of affording the defendants an opportunity to examine them to test the accuracy of those compilations. I have the record references marked if your Honor chooses to read them.

\* \* \* \* \*

Mr. Rubin. \* \* \* after observing information taken from the books which, in my opinion, were beyond the scope and purpose of the production of those records, I stated to those present whom I have named that in my opinion the purpose of that examination was solely to test the accuracy of Government’s Exhibit No. 6 and for no other purpose, and Mr. Margolis stated that they would use those books for any purpose of their case. \* \* \*

Mr. Margolis stated that I had no right to order them as to any method of proof, and I stated that I felt my obligation was to see that the Court’s order in so far as I understood it was to be carried out.

Mr. Anderson then stated that I was entitled to no further statement from them other than that which

they had given, and Mr. Margolis asked if they could go back and examine the books, and I said 'only for that purpose.'

After other conversations these gentlemen left. \* \* \*

Mr. Margolis. The statement made by counsel is partially accurate and partially inaccurate; inaccurate in large part in what it omits.

Mr. Rubin came into the office where we were working and asked if we were doing anything more than adding up those figures which were represented by the totals in People's Exhibit 6. We said that we were, but that we would not tell him what we were doing, and that we did not have to tell him what we were doing, and that we were not subject to the supervision of Mr. Rubin as to the manner in which we inspected the books.

The information which we were taking from the books consisted of species of fish, pounds, and prices.  
\* \* \*

We told Mr. Rubin that we did not think we had to advise him in advance of the subject-matter of our cross-examination, or of the manner in which we were going to conduct our cross-examination.

Our position, very simply, is this, your Honor:

First. We are prepared to tell the court precisely what we were doing and the purpose for which we were doing it. We are not prepared, unless otherwise directed by the court, prior to the cross-examination, to reveal to the government the purpose for which we were gathering those figures. \* \* \*



Second. \* \* \* The best evidence in this situation is the books themselves. Ordinarily, except for a modification of the best evidence rule, the books themselves would be required to be in evidence, and if the books were in evidence then we could utilize those books for any purpose material to the case, whether helpful to us or helpful to the theory of the prosecution. \* \* \* I submit that we would have the right to cross-examine this witness with reference to anything which those books showed, which was material, and that the government could not limit its offer in those cases to prove its own point and say, 'You can't prove anything by those books because we offered it only to prove our point.'

If evidence goes in, unless limited by the court, it goes in for all purposes. The summary being merely a summary of what is in the books it is, in effect, as if the books had gone in, as far as our right to examine the books is concerned and to cross-examine the witness on the basis thereof. \* \* \*

The Court. \* \* \* it was about 4:00 o'clock yesterday afternoon until 6:00, is that correct?

Mr. Margolis. From 5:00 to 6:00 was spent in arguing.

Mr. Rubin. I beg your pardon, I would say about 10 minutes was.

The Court. Well, it was from 4:00 to 6:00. I think that was ample time for a man familiar with books to examine those books to conduct an examination concerning Exhibit No. 6.

Mr. Margolis. In order that the record may be complete, your Honor, I want to state that it was a physical impossibility to complete the examination within that time, and I am going to state now what we were doing. \* \* \*

Your Honor will recall that one of the questions that was asked Mr. Ross on cross-examination was how he explained that there was so small a difference between the amount which he paid for the fish and the gross which he received for the fish. \* \* \*

A quick examination of the books—and I am not prepared to say that we have completed that examination or have arrived at any definite conclusion; we didn't have an opportunity to do that—a quick examination indicated that the price differential between what was paid and what was received ran about 100 per cent, and that a difference of about 40 per cent was simply inconsistent. We were therefore listing buying prices and comparing them with selling prices for the purpose of seeing whether that differential which was shown to exist on there was at all consistent with his comparative buying and selling prices. Now I didn't want——

The Court. What difference does it make what profit he makes?

Mr. Margolis. Because, if your Honor please, if he was selling at a hundred per cent mark-up and the sum total shows only a 40 per cent mark-up, then there is something wrong with the figures. That is quite

obvious. If a man sells his fish, keeps selling an item at a hundred per cent mark-up, then at the end of the year the total sales are only 40 per cent in excess of the total amount paid up, there is an error someplace, either an error or a misrepresentation. \* \* \*

The Court. It seems to me that that is immaterial. The figures are there. What his profit was is immaterial, and this lawsuit, as far as I can see——

Mr. Margolis. Mr. Ross himself told us while we were there that it took his girl three days to prepare the figures and we are given a sum total of, even accepting Mr. Rubin's statement as true, which I don't, two hours. \* \* \*

Mr. Margolis. Just so the record will be clear.

I want to ask leave at this time so that the record will be clear to present evidence in support of our position as to what happened yesterday, the statements of Mr. Ross as to how long it would take to examine those books, precisely what we were doing with respect to those books, so that there will be no question that the representation made——

The Court. No one has challenged your statement.

Mr. Margolis. I beg your pardon?

The Court. No one has challenged the veracity of your statement.

Mr. Margolis. The statement then I assume is accepted as true for the purpose of your Honor's ruling?

The Court. Whatever this is.

Mr. Margolis. Then I ask for a ruling on my request that we be allowed to examine the books without further supervision.

The Court. The request is denied.

\* \* \* \* \*

Mr. Margolis. May I make a request that we be permitted to continue to examine the books for the purpose of further checking the figures first and, second, for the purpose of comparing the purchase price and sales price of the various types of fish as shown by the books of Mr. Ross?

The Court. Your request is denied.

\* \* \* \* \*

Mr. Margolis. I move to strike out Government's Exhibit 6 from the record.

The Court. The motion is denied.

Mr. Margolis. At this time I move to strike all of the testimony of Mr. Ross with respect to Government's Exhibit No. 6.

The Court. The motion is denied." (Tr. pp. 294-309.)

## Appendix DD

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He was assistant professor of Statistics and Sociology in the graduate faculty of Columbia for a period of eight years. He was chief statistician of the Columbia office of Radio Research, now called the Bureau of Applied Social Reference, for some seven years, in which capacity he supervised all the statistical work of the Office of Radio Research. He dealt mainly in war research of a statistical nature under a contractual arrangement with the Bureau of Census, the Office of War Information and other governmental agencies. One of the many things done by the Office of Radio Research was to prepare tests for foreign language propaganda broadcasts for the foreign division of the OWI, the major problem being to test reactions of individuals for the purpose of redesigning foreign language broadcasts to do a more effective job. For this purpose, it was necessary to design an experiment to carry out the given purpose, to wit: the devising of scales to quantitatively record the reactions of individuals, and devising tests of significance to determine their likelihood of occurring again. In addition, he has acted as consultant on statistical jobs and problems for the Columbia Broadcasting System, the National Broadcasting Company, the Princeton Radio Research Project, the Rockefeller Foundation, the E. I. Dupont de Nemours Company, Time Magazine, Fortune Magazine, more particularly the Fortune Poll, War Production Board, Army Service of Supply, Office of War Information, and the United

States Bureau of Census. Among other things, he worked on a special cross-section sample of the United States for the War Production Board with the objective of determining the needs of consumers during the war. He functioned as consultant to Elmo Roper, the director of the Fortune Poll, for the purpose of working out sampling techniques and mathematical problems. He is under contract to write a book on statistics for Houghton, Mifflin & Company, of which he has written some 900 pages out of a total of 2,500 pages. In addition, he has written a number of articles in the technical field of statistics, most of which are in various governmental agency files. (Tr. pp. 2174-79, 2189-90.)

No. 11638.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES McLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, and RAY J. MORKOWSKI,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR THE UNITED STATES.

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*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF FOR THE UNITED STATES.**

---

This case involves appeals from judgments of the District Court entered upon the jury's verdict in a criminal prosecution under Section 1 of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A., Sec. 1, as amended [R. 75-98]).

On August 23, 1946, an indictment was returned against Local 36 of the International Fishermen and Allied Workers of America and 15 of its officers and members,

charging them with conspiring to fix, determine, establish, and maintain artificial and non-competitive prices for the sale to dealers of fresh fish and crustaceans caught in the waters of the Pacific Ocean, both territorial and foreign, off the coast of California, in the area from Morro Bay off the Southern California Coast to and including the territorial waters of the West Coast of Mexico [R. 2-20]. A motion to dismiss the indictment was filed on September 23, 1946 [R. 21-22] and was overruled on November 12, 1946 [R. 24-25]. On February 11, 1947, a motion was filed to dismiss the indictment on the ground that the Grand Jury which returned the indictment was improperly selected and to strike out the trial jury panel in its entirety because it was selected improperly [R. 25-28]. After hearings on this motion, it was overruled [R. 28-29, 2523-2574]. Trial of the cause began on March 18, 1947, and closed on May 7, 1947. On May 7, 1947, the jury returned a general verdict of guilty as to all defendants [R. 67-68], except defendant Floyd Sherman in whose behalf the trial court directed a verdict of acquittal at the close of the Government's case [R. 32-33]. On May 12, 1947, defendants filed a motion in arrest of judgment [R. 68-69] and a motion for judgment of acquittal or for a new trial [R. 70-71]. Both motions were overruled [R. 72-73]. On May 21, 1947, the trial court entered judgment and commitment as to each defendant found guilty and imposed fines totalling \$12,090.00 [R. 73-98]. This appeal was taken from the judgments of the trial court entered upon the jury's verdict.



## STATUTE INVOLVED.

The indictment charged violations of Section 1 of the Sherman Act. This section, in so far as is material, provides:

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal \* \* \* Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

## THE INDICTMENT.

The Indictment [R. 2-20] charges that all of the defendants are members of the defendant Association, and have either been concerned with and participated in the management, direction, and control of the policies and activities of the defendant Association, or have authorized, ordered, or participated in the activities constituting the offense described in the Indictment. The Indictment discloses that only eight of the individual defendants are fishermen [R. 4-6].

The Indictment charges, and the evidence shows, that approximately 20,000,000 pounds of fresh fish, with a retail market value of over \$9,000,000, are caught annually in the fishing area and are sold to dealers<sup>1</sup> located at the fishing ports of Morro Bay, Santa Barbara, Santa Monica,

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<sup>1</sup>Fresh fish sold to canneries is not involved in this case.

Redondo Beach, San Pedro, Newport Beach and San Diego in Southern California [R. 6-7; Gov. Exs. 34 and 35, R. 842].

The Indictment alleges that the fishermen members of the defendant Association are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen, engaged in business on their own account, and operate fishing boats for their own account and profit. The Indictment further alleges that no employer-employee relationship exists between the fishermen and the dealers to whom their catch is sold, and that the fishermen members of the defendant Association sell their catch directly to dealers, and do not act collectively through the defendant Association in catching, producing, preparing for market, processing, and handling their catch [R. 7].

The Indictment further alleges that the conspiracy began sometime prior to May 1946 and consisted of a continuing agreement

(a) to fix the minimum prices to be charged by the fishermen for the sale of fresh fish caught by them in the fishing area and thereafter sold by the fishermen to dealers;

(b) that the minimum prices to be paid by the dealers to the fishermen would be the maximum price as set by the OPA, where such agency had fixed a price for fresh fish;

(c) that when any ceiling prices set by the OPA for fresh fish sold to dealers by fishermen were removed, the maximum OPA price would remain the minimum price charged for any fish so sold to dealers by the fishermen;

(d) that when no OPA price had been set, the Association would agree with the dealers on the price to be paid the individual members of the defendant Association for all fish sold by any member to dealers;

(e) that the prices of fish sold by the members of Local 36 should be stabilized and non-competitive;

(f) that the aforesaid agreement as to prices should be reduced to written contract form,<sup>2</sup> and imposed upon fish dealers who refused to sign the written contract form by picketing and boycott methods, and to prefer dealers signing the written contract form and to refuse to sell or deliver any fish caught by members of defendant Association to dealers who would not sign the written contract form [R. 8-9].

The Indictment further alleges that as part of the conspiracy the defendants also agreed

(g) to prevent dealers who refused to sign the written contract form from securing any supply of fresh fish from any fishermen or any other source by picketing and boycott methods;

(h) that they would prevent such non-signing dealers from shipping or transporting through their own or other means of transportation any fish purchased or acquired by them;

---

<sup>2</sup>A copy of the price-fixing agreement in written contract form as submitted to the dealers for signature pursuant to the conspiracy is affixed to the Indictment as Exhibit "A" [R. 14-21, incl.]

(i) that they would picket and boycott any concern or individual accepting any fresh fish for shipment from such non-signing dealers to points in or outside the State of California;

(j) that they would also boycott and picket any concern or individual who attempted to deliver to the usual place of business of the non-signing dealer any fresh fish shipped to such dealer by brokers or dealers located in or outside the State of California; and

(k) that they would also prevent fishermen who were not members of the defendant Association from fishing and delivering any fresh fish to anyone other than a dealer who signed the price-fixing contract, and then only to such a dealer after said non-member fishermen had picketed the non-signing dealers, or, in lieu thereof, had paid a stipulated picket fee to the defendant Association [R. 7-10].

The Indictment also alleges that the defendants had submitted the written form of the price-fixing contract to all dealers in and around the fishing ports before described, and that the defendants, for the purpose of forcing and coercing fish dealers into signing the form of price-fixing contract, had threatened to withhold and had withheld from such non-signing dealers supplies of fresh fish, and by picketing and boycotting methods had attempted to prevent and had prevented the dealers who refused to sign said form of contract from securing fresh fish from other sources [R. 10-11].

I.

STATEMENT OF FACTS.

The evidence shows that members of the appellant Association caught and delivered approximately 90% of the fresh fish landed in the fishing ports north of San Diego named in the Indictment [Gov. Ex. 409, R. 1117]. In addition to the fresh fish caught in the fishing area and landed at said fishing ports, more than one million pounds of fresh fish is shipped annually from the States of Oregon and Washington to dealers located at said fishing ports [Gov. Exs. 34 and 35, R. 842].

**A. The Relationship Between the Fishermen and the Dealers Is That of Sellers and Buyers of Fish, and Not That of Employees and Employers.**

Approximately 55% of the members of the appellant Association classified themselves on their membership application cards as self-employed fishermen [R. 1769]. Many of the fishermen members of the Association, as well as many non-member fishermen, owned and operated their own fishing boats and fishing equipment [R. 1370].

The fishermen sell their fish to the dealers, and the price paid by a dealer to a fisherman is a matter of open negotiation between the fisherman and the dealers on the wharf at the time of the sale [R. 137-8, 279, 370-1, 380, 513, 1458, 1461, 1477-8].

The fishermen are paid cash at the time of the sale of there is more than one fisherman on a boat, the captain or skipper of the boat usually does the bargaining with

the dealers for the sale of the catch and the fishermen receive a share of the total proceeds from the sale for their services [R. 453, 513, 548, 767, 798, 851, 866, 873, 924-5, 1446, 1455, 1472]. The record is replete with numerous references to these open negotiations for the sale of the catch between the fishermen and the dealers, and the record shows that these negotiations are referred to as purchases or sales, and that the dealers and fishermen are referred to in these negotiations as "buyers" and "sellers" of fish [R. 139, 286-7, 381-2, 439-40, 472, 485, 493, 804-5, 851-2, 905-6, 1488, 1702, 1714-5].

The record shows further that the individual fishermen themselves determine when and where they will fish, and that where there are two or more fishermen on a boat and one of the fishermen owns and operates the boat and gear, a share of the proceeds of the catch is allocated to the boat and gear [R. 1474]. The individual fishermen, in carrying on their fishing operations, do not receive any compensation from any dealer, and are not subject to the direction and control of any dealer as to when or where they will fish or what fish they will endeavor to catch [R. 440, 472, 485, 493, 804-5, 812, 905-6, 973, 1488, 1702, 1714-5].

The price received by the fishermen for their catch is determined by the law of supply and demand, and fluctuates according to the scarcity or surplus of supply [R. 258, 279-81, 367, 960-3]. The fisherman regards himself as independent of any dealer and he is not subject to the orders or control of any person other than himself or the captain of the boat on which he fishes in carrying on his fishing operations [R. 485].

## **B. The Association Is Not a Common or Collective Marketing Agency.**

The record shows that the fishermen sell their catch to a dealer or dealers as they come in with each load, and such sales are individual sales and are not made by or through the appellant Association [R. 1448, 1461, 1475, 1598-9, 1606, 1699, 1705]. There is no evidence in the record that the appellant Association itself ever sold any fish for its members or was ever paid for any fish sold by its members to dealers. There are many fishermen who are not members of the Association [R. 1517].

## **C. The Price Fixing Conspiracy.**

As early as 1944, the appellant Association entered into so-called "closed shop" contracts with dealers, which fixed the price to be paid by the dealers for all fish sold to them by members of the appellant Association [Gov. Ex. 240, R. 1384]. Paragraph 3 of this exhibit suggests that some of the practices resorted to in this case by the appellants were instituted on a small scale by the appellants at that time. This paragraph provides that after notice from the appellant Association, a dealer would not purchase fish from any fisherman who was not a member in good standing of the appellant Association [R. 1384]. Dealers were furnished with the names of fishermen who were not members of the Association in order to effectuate the "closed-shop" provision of the 1944 contract [Gov. Ex. 413, R. 1442; Gov. Ex. 414, R. 1442].

In April 1946, members of the appellant Association held a meeting at which it was agreed that a contract fixing the minimum price to be paid by dealers for barracuda would be entered into with all Southern California fresh

fish dealers, and this minimum price was to be the OPA maximum price [Gov. Ex. 201, R. 1115; Deft. Ex. R, R. 1308]. On April 25, 1946, the records of the appellant Association point out that it then had sufficient members to put up a unified front on a coastwide program "in an effort to stabilize fish prices" [Gov. Ex. 202, R. 1115]. On May 17, one of the appellants wrote a letter as representative of the appellant Association, setting forth the plan of action to be followed by the Association and its members in getting the price-fixing contract signed by the dealers. It states:

On Monday, May 20, 1946 a contract will be presented to each dealer in this area. The committees will personally present the contract in San Pedro, Newport and Santa Monica simultaneously. They will be given forty-eight (48) hours to sign. If the contracts are not signed by 7:00 A. M. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California. We have then given the dealers to June 1, 1946 to sign, or after that time we will endeavor to stop the flow of all northern fish into this area as well. [Gov. Ex. 203, R. 1115.]

The price-fixing contract form which was prepared by the appellant Association [Gov. Ex. A attached to the Indictment, and Gov. Ex. 3 in evidence; R. 14-20, 148] contains provisions fixing the maximum OPA price as the minimum price [Par. 4A, R. 16]; and provides that when OPA price ceilings are removed, the maximum OPA price shall remain the minimum under the contract [Par. 4C, R. 16].

The contract form also indicates by its language that its purpose is to stabilize the distribution as well as the



price of fresh fish, and that all dealers signing the contract will be given equal and first preference in the purchase of all fish caught by members of the Association [Par. 3, R. 16].

Paragraph 6 of this contract form provides that the dealer shall make payment directly to the members of the Association for any fish purchased, while Paragraph 7 provides that the appellant Association, referred to in the contract form as a Union, “\* \* \* assumes no liability of any kind under the terms of this agreement, \* \* \*” [R. 17].

The contract form was submitted to the dealers at the fishing ports previously mentioned in the latter part of May, 1946, and the dealers at such ports were informed that if they did not sign the proposed contract they would not receive any fish from any members of the Association, or from any other fishermen, and they would be prevented, by picketing and boycotting methods, from receiving fresh fish from any other source [R. 166, 437; Gov. Ex. 203, R. 1115]. The record shows that some of the dealers at Newport Beach and at fishing ports other than San Pedro signed the contract, but that none of the fish dealers at San Pedro signed the contract when it was presented to them<sup>3</sup> [R. 1659; Gov. Ex. 211, R. 1118; Gov. Ex. 303,

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<sup>3</sup>At Newport Beach, two of the dealers refused to sign the proposed contract but three of the dealers there did sign the contract. The evidence shows that the three dealers who signed the contract continued to receive all of the fresh fish they desired during the so-called “strike,” whereas the two non-signing dealers were picketed and boycotted by members of the appellant Association and were prevented from acquiring or securing any fresh fish to the same extent and in the same manner as the non-signing dealers at San Pedro [R. 788-9, 808-9, 858-62].

R. 1118]. The record shows that when the contract form was presented by the appellant Zafran to one of the San Pedro dealers for signature, the latter was told that if he did not sign, ways and means would be found to compel him to sign [R. 147].

The appellants further showed their intention to stop all commerce in fresh fish into Southern California unless the dealers signed the price-fixing contract when, on May 18, appellant Zafran, secretary of the Association, notified one of the Santa Barbara fish dealers that "All dealers from Santa Barbara to San Diego will be signatories to the enclosed agreement. Unless the agreement is signed by the time specified therein, it is possible that the flow of all fish into Southern California may cease \* \* \*" [Gov. Ex. 27, R. 1115-6]. From that time on events moved rapidly and finally culminated in the so-called strike which commenced on May 29.

On May 21 a meeting of the membership of the Newport Beach unit of the appellant Association passed a resolution which read in part as follows: "Moved, seconded and carried that we deliver fish only to the markets that have signed \* \* \*" [Gov. Ex. 204, R. 1117]. On May 25, the minutes of a joint executive committee of the appellant Association [Gov. Ex. 205, R. 1117] show that it went on record demanding a minimum price stabilization contract with all dealers in the territory from Morro Bay to San Diego and that units were urged to authorize a "strike" to enforce the demands against the dealers not signing the contract form. Dealers were to be delivered fish provided they agreed not to sell any non-signing dealer.

The minutes of a membership meeting of the appellant Association dated May 27 [Gov. Ex. 302, R. 1117] point up and describe the tactics used by the Association to force the non-signing dealers into the price fixing contracts. The appellants' activities are further outlined in a letter of the same date from the appellant Association to the San Pedro fish dealers which states [Gov. Ex. 236, R. 1124]: "After a joint-meeting of the San Pedro Dealers and Fishermen it has been decided that if a minimum price agreement has not been signed by the San Pedro fresh fish dealers not later than Tuesday, May 28, 1946, 6:00 p. m., that no fish of any kind will be brought into San Pedro, starting 7:00 a. m., Wednesday, May 29, 1946." This was the final ultimatum to the non-signing dealers at San Pedro. The so-called "strike" commenced on May 29.

From and after the receipt of the ultimatum given by the representatives of the appellant Association, non-signing dealers at San Pedro were picketed and boycotted by the appellants and members of the appellant Association for over a month and were prevented from securing any fresh fish from fishermen members of the appellant Association, or from non-member fishermen, and they were also prevented from receiving shipments of fresh fish at their usual places of business from points outside the State of California [R. 156, 163-4, 171, 185, 313, 317-8, 329, 397-400, 402-3]. As was stated by one of the San Pedro dealers in answer to a question as to whether he purchased any fish from fishermen on the sea side of his establishment or received any deliveries of fish from points outside the State of California at his place of business during the so-called "strike," his answer was: "No, sir, I was closed entirely." [R. 317]. The testimony of other

non-signing dealers at San Pedro and Newport Beach was to the same effect [R. 156, 171, 185, 313, 329, 400, 402].

Documents from the files of the appellant Association show the progress of this so-called "strike" and the use of the picketing and boycotting methods by the appellant Association against the non-signing dealers in preventing them from securing any fresh fish to carry on their business. For example, Government Exhibit 303 [R. 1118], reads in part: "Redondo beach dealers signed. Santa Monica have closed shop—San Pedro is still out with pickets out."

On June 28, a letter was sent by the appellant Association to the Newport Beach and San Pedro dealers [Gov. Ex. 37, R. 1402] in which it was pointed out that fresh fish were to be delivered to dealers only on the basis of minimum prices established by the Association, and that future deliveries would be made only on that basis. Picketing and boycotting of non-signing dealers were to cease only when the dealers signed the agreement [Gov. Ex. 233, R. 1123; Deft. Ex. W, R. 1354].

**1. Coercion of and Pressures Brought to Force Non-member Fishermen to Participate in the Boycott.**

The evidence shows that fishermen who were not members of the appellant Association and who customarily sold their catch to dealers at San Pedro were prevented from selling to non-signing dealers by appellants and members of the appellant Association [R. 446, 452-3, 456, 465-6, 483-4, 488-9, 491-2, 504, 551, 768, 779, 785, 802]. These non-member or independent fishermen were required to secure a "clearance card" from the "visiting" or "cooperative committee" of the appellant Association before they were permitted to leave the harbor to go fishing, and could

only sell their catch to dealers who signed the price-fixing contract form [R. 442-5, 464-8, 481-3, 491-2, 500-1, 519-22]. As was stated by Mr. Castagnola, one of the non-member fishermen who owned his own boat: "They will tell you if you can go out fishing or not." [R. 444]. After appearing before the committee of the appellant Association to secure a "clearance card" to fish, the non-member fishermen left the room while the committee passed upon the request of the non-member fishermen for a clearance card. If the request for the clearance card was granted, they were permitted to fish but were told that they could only sell their fish to signing dealers [R. 445, 1491-2].<sup>4</sup>

The non-member fishermen who were required to get clearance cards from a committee of appellant Association, in order to fish and sell any fish caught, could secure such clearance cards only after they had picketed non-signing dealers or, in lieu thereof, had paid a picket fee to the appellant Association [R. 468-9, 477-8, 492-3, 501-5, 510-12, 522-3, 530-2, 544, 552-3, 774-5, 788-9, 803-4, 868-9].<sup>5</sup> As one of the non-member fishermen testified,

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<sup>4</sup>This action of the appellant Association resulted in the signing dealers at Newport Beach receiving all of the fish caught by the independent San Pedro fishermen as well as the San Pedro members of appellant Association, during the month of June and part of the month of July, 1946, when the so-called "strike" was called by the appellant Association to force the non-signing dealers to sign the price-fixing contract [R. 471].

<sup>5</sup>The tactics, or procedure, used by the appellant Association to bring independent fishermen into line with their efforts to force the price-fixing contract on the dealers is illustrated by the testimony of one of the non-member fishermen. He testified that he was told by one of the appellants: "'You fellows have to picket to go out again, or else you have to stop fishing.' So he told us to go to the office and see the officials over in the office to get a clearing card." [R. 478].

“We went in and asked them for a clearance card, so they said they had to call a little meeting. We had to step outside for a few minutes to see what they would decide, and finally they said that they would give us a card according we did picket duty.” Question: “Was there anything said about where you could sell your fish?” Answer: “On the dock down there Tommy [the appellant Otis W. Sawyer] said we could either take the fish to Newport and deliver it to the Cooperative, Western Cannery and Poladini [the three signing dealers at Newport] \* \* \*” [R. 482-3].<sup>6</sup>

Several other non-member fishermen testified concerning the requirements imposed upon them by the appellant Association during the period of the so-called “strike” against the non-signing dealers in order to secure clearance cards [R. 447, 468-9, 484, 503-4].

The strike committee minutes of the San Pedro unit of the appellant Association for May 30 [Gov. Ex. 207, R. 1118] refer to 35 boats to be contacted and if they do not help in the strike, “action is to be taken against them.”

No clearance cards were to be issued without the consent of the strike committee [Gov. Ex. 212, R. 1119]. Certain independent boats were considered “unfair,” and visitation committees were put in operation in an effort to persuade the “unfair” boats to cooperate [Gov. Ex. 304, R. 1119].

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<sup>6</sup>This same witness testified that he dumped some shark carcasses during the period of the strike because he was unable to sell them [R. 483]. The record contains other evidence of dumping by non-member fishermen on account of their inability to sell at their usual markets. Another non-member fisherman testified that his “picket fees” were deducted from his share of the catch by his captain and paid over to the Union in order to avoid trouble [R. 868].

On June 13 the records [Gov. Ex. 225] of the appellant Association contain a reference to non-cooperative non-member boats and it was moved, seconded and carried "that the following boats be placed on the non-cooperative list as of June 15th. Same named boats be removed from list after straightening up with Local 36. If not straightened up within reasonable time will be put on a definite unfair list." This exhibit also shows that some of the boats named therein "will pay for pickets" [R. 1122].

On June 15, it became increasingly clear from the records of the Association that:

Every boat from San Pedro and Long Beach area must have a clearance card to fish for the duration of the strike. Clearance card to be issued by Union. Any boat not complying with this order shall be unfair.

Thereafter for the duration of the strike all fishermen shall be obligated to stand four hours picket duty every six days or pay for said four hours at the rate of \$1.00 per hour. [Gov. Ex. 227, R. 1122].

On the same date it appears from the strike membership minutes of Local 36 [Gov. Ex. 228, R. 1122], that "all boats fishing from the San Pedro area for the duration of the strike shall have in their possession at all times a clearance card issued by the Union. That any boat not complying shall be put on the unfair list." The question of clearances and assessments was also discussed at this meeting, and under the discussion of clearance "it was pointed out that it is a serious matter to be put on the unfair list."

One of the means used by the appellants to force non-member fishermen into line was to deprive them of an opportunity to secure ice for their boats. On June 4 the As-

sociation minutes [Gov. Ex. 214] show that the Union Ice Company was contacted and was asked to honor the "clearance cards" of the Association and not to deliver ice to any fresh fish boat "who does not have one." [R. 1120].

**2. Enlisting Cooperation From Third Parties to Force Dealers to Sign Contracts.**

The record contains the testimony of an employee of an ice company, which supplied the fish dealers at San Pedro with ice in the usual course of business, to the effect that he made no deliveries of ice to the fresh fish dealers at San Pedro during the so-called "strike" [R. 558]. The route superintendent of this ice company testified that he received a telephone call from a man who said he was an official of the appellant Association requesting the cooperation of the ice company in not sending icing trucks into the San Pedro dealers' markets during the strike [R. 560]. A representative of this ice company also testified that any fish consigned to fresh fish dealers at San Pedro from Seattle, Washington, remained at his plant during the so-called strike until the dealers picked it up themselves, and that the fish freeze service of his company was available to fishermen as well as to dealers [R. 563-5].

The records of the appellant Association refer to the pressure put on the ice companies to refrain from delivering ice to the non-signing dealers [Gov. Ex. 304, R. 1119]. A letter dated May 31 mentions the contact of the Association with an ice company and recites that: "The Ice Company will also cooperate by no delivery of ice." [Gov. Ex. 28, R. 1118].



3. Activities of Appellants in Preventing Non-signing Dealers From Receiving or Shipping Fresh Fish From or to States Other Than California.

The boycotting and picketing of the non-signing dealers by the appellants and members of the appellant Association operated also to prevent common carriers such as the American Railway Express Agency and West Coast Freight Lines from making any deliveries of fresh fish to the usual places of business of the non-signing dealers in San Pedro during the so-called "strike" [R. 161-4, 171, 572-7, 640-3].

A representative of the Railway Express Agency testified that he visited the San Pedro dealers' docks at the time of the so-called "strike" and was told by one of the appellants that "they did not want our trucks to cross their picket line" [R. 573]. This witness also testified that the Agency's trucks were not permitted to pick up any outbound shipments from the San Pedro fish dealers during the so-called strike; and that if they made any deliveries to the non-signing dealers other than that of the fish then in route, the office of the Railway Express Agency in San Pedro would be picketed [R. 574].<sup>7</sup>

The local agent for the West Coast Fast Freight, another common carrier handling shipments of fresh fish from outside the State of California to the San Pedro fish

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<sup>7</sup>Written notice to the same effect was also sent to the Railway Express Agency by the appellant Association [Gov. Ex. 19, R. 576; R. 580].

dealers, testified that during the so-called "strike" his company delivered no fish to the San Pedro pier and that a portion of the fish consigned to the San Pedro fish dealers from points outside the State of California was re-delivered by his company to the Union Ice plant at Wilmington during the so-called strike [R. 642].

A dispatcher for the Los Angeles-Seattle Motor Express, another common carrier delivering fish to the San Pedro dealers from points outside the State of California, testified that on May 29, 1946, when the so-called "strike" commenced, he dispatched some fish to the San Pedro dealers which were not delivered but were diverted back to various dealers in Los Angeles [R. 655-6]. A driver for this company testified that on May 29, 1946, he was driving a truck for his company and was attempting to make a delivery of fish to the wharf of a San Pedro dealer when he was stopped by a picket and told that: "We got the place tied up." He finally delivered the load of fish to an icing plant at Wilmington [R. 821-3]. Another driver for the same company was told by one of the pickets for the appellant Association not to cross their picket line and that he could not back the truck up to the dock to make the delivery of fish to the dealer to whom the fish was consigned. He testified as follows:

"In fact, they wouldn't let me in to the wharf, as far as that goes. So I was going to take the truck out on the highway and was going to transfer the fish from my truck to his [the dealer's] truck and he was going to bring it back in. I was told if that would take place that I would be followed."

Question: "You were told by whom?"

Answer: "The pickets. If that was to take place, that they would have somebody follow us and destroy the fish, or knock it off the truck or something." [R. 878-9].

This witness identified appellant F. S. Smith as having made the foregoing statement to him [R. 879].

Government Exhibit 303 [R. 1118] substantiates the testimony of the Railway Express agent relative to the effect of picketing in stopping shipments of out-of-state fish to the non-signing dealers. In this exhibit it appears that: "McLaughlin [one of the appellants] explained the R. R. Express was to notify all fish shippers, and that they would handle no fish, with our area as a destination," and that "We should finally grow up, show pressure, see that no fish be handled by the unfair markets." Government Exhibit 19 [R. 576] deals further with efforts of the appellants to force non-signing dealers into the price-fixing contract by notice to the Railway Express that "\* \* \* there is now a strike pending in the San Pedro harbor area against the following concerns [the non-signing dealers]. We ask your cooperation in this matter. In the event that you should accept any fish for shipment from any of said concerns, we will then be compelled to advertise through a picket line the fact that you are accepting fish from these establishments during the pendency of a strike."

Government Exhibit 28 [R. 1118] shows that all trucks endeavoring to deliver fish to non-signing dealers had been stopped.

II.

SUMMARY OF APPELLANTS' ASSIGNMENTS  
OF ERROR.

An examination of the brief of the appellants shows that their appeal is based on seven principal assignments of error. They relate to:

I. The instructions given to the jury and the refusal to give certain instructions requested by the appellants;

II. The exclusion of certain evidence offered by the appellants;

III. The granting of a motion to quash subpoenas *duces tecum* served upon certain witnesses by the appellants;

IV. Alleged error in admitting evidence offered by the Government;

V. The contention that the Indictment does not state a public offense; or

VI. That if it does, the evidence is insufficient to support a verdict; and

VII. That the grand jury which returned the Indictment and the petit jury which tried the appellants were improperly selected.

The appeal thus attacks the legality of the methods used in selecting the grand and petit jury panels (Assignment VII), the legal sufficiency of the Indictment itself (Assignment V) and certain rulings made by the District Court during and after the close of the trial on the merits (Assignments I, II, III, IV, VI).

III.

SUMMARY OF GOVERNMENT'S CONTENTIONS AND ARGUMENT IN REPLY TO THE ASSIGNMENTS OF ERROR.

The appellant Association and the 14 individual appellants involved in this appeal<sup>8</sup> are charged in the Indictment with having engaged in an unlawful conspiracy to fix, determine, establish and maintain arbitrary, artificial and non-competitive prices for the sale of fresh fish to dealers for fish caught in territorial and foreign waters off the Coast of California from Morro Bay to and including the territorial waters of the West Coast of Mexico, and to prevent dealers at fishing ports in Southern California who would not pay the fixed prices from obtaining, selling or shipping any fresh fish.<sup>9</sup>

The evidence offered by the Government supported the material allegations of the Indictment in every respect and was generally uncontradicted. It was one of the contentions of the Government on the trial of the case that, in accordance with the allegations of the Indictment, the fishermen members of the appellant Association were independent businessmen engaged in the business of catching and selling fresh fish on and for their own account and profit, and that the conspiracy to fix the prices of fresh fish moving in interstate commerce had had the intended

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<sup>8</sup>A verdict of acquittal was directed by the Court at the close of the Government's case as to one defendant, Floyd Sherman.

<sup>9</sup>The evidence showed that approximately 20,000,000 pounds of fresh fish were caught annually in the fishing area and sold to dealers at the fishing ports in the area, and about 1,000,000 pounds were shipped annually from points outside the State of California to dealers at the fishing ports in the area [Gov. Exs. 34 and 35, R. 842].

effects described in Paragraph 15 of the Indictment and was illegal *per se* under Section 1 of the Sherman Act. To this the appellants advanced three defenses:

(1) that if appellant fishermen were independent businessmen, they were original producers who could legally combine together to obtain uniform stabilized price agreements between themselves and wholesalers, and that the rule of reason prevents such conspiracies or price-fixing agreements from being illegal *per se*;

(2) that under the Fishermen's Marketing Act, an association need only be a "bargaining" agent for its members and that the activities of the appellants were only those of a fishermen's bargaining association engaging in legitimate activities;

(3) that under Section 6 of the Clayton Act the appellants' activities were only those of a labor union engaging in legitimate activities in negotiating for the sale of the labor of fishermen to dealers.

These defenses are obviously in the nature of pleas in confession and avoidance.

The Government contended that the first defense was wholly without merit under the law. To the second and third defenses, the Government replied that if the appellant Association and its members were operating under the Fishermen's Marketing Act, a conspiracy to force a price-fixing agreement on non-assenting dealers by coercive methods was a violation of Section 1 of the Sherman Act; and that if the appellant Association and its members were a labor union, no labor dispute existed between the members of the appellant Association and the fish dealers, as any dispute which might exist between them

was solely over the price or terms and conditions at which the members of the appellant Association would sell their fish to the dealers.

The Government accordingly submits that as to appellants' points I. A., B., C. (Appellants' Br. 33-84), the instructions given by the Court [R. 1940-43] adequately and fully covered the rights of the individual appellants to combine and act together for legal objectives under either the Clayton Act or the Fishermen's Marketing Act. The jury were also instructed [R. 1944-45] on the possible application of the Norris-LaGuardia Act to the evidence if they found as a fact that the relationship of employer-employee existed between the fish dealers and the fishermen, and that there was a "labor dispute" as defined by the Court, between the members of the appellant Association and the fish dealers.

The refusal of the Court to give the instructions requested by the appellants on Section 6 of the Clayton Act and the Fishermen's Marketing Act was not error since the instructions given by the District Court fully and completely covered any application of the Clayton or Fishermen's Marketing Acts to the evidence, and any rights the appellants might have under said laws. The instructions requested by the appellants did not properly state the law.

I. D. (Appellants' Br. 84-117)<sup>10</sup>—While the appellants apparently admit that a conspiracy to fix prices of products is illegal *per se* as an unreasonable restraint under the Sherman Act, their contention that the rule applies

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<sup>10</sup>For the convenience of the Court the numbers used in appellants' brief will be placed at the left-hand side of the first paragraph in which appellants' numbered contention is herein discussed.

only to aggergations of industrial capital and to situations where a combination has the power to fix prices to the consumer does not correctly state the law, and is without merit. The so-called "rule of reason" and economic justification argument, and any evidence offered in support thereof, is inadmissible and is no defense to a charge of price-fixing. These contentions of the appellants are therefore wholly without support in law, and are contrary to the rule in *United States v. Socony-Vacuum Oil Co., et al.*, 310 U. S. 150; and related cases (*United States v. Trenton Potteries Co.*, 273 U. S. 392; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States v. Masonite Corp.*, 316 U. S. 265).

I. E. (Appellants' Br. 118-122)—The appellants' contention that the Government must prove that the conspiracy would have a so-called "direct" effect upon interstate commerce in fresh fish is without merit, as the act of conspiring to perform an illegal act is in itself illegal where the intent or the necessary effect of the conspiracy is to enable the conspirators to restrain or control the supply or price of the commodity sold or moving in interstate commerce, or to discriminate as between would be purchasers of such products. *Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295, at 310; *United Leather Workers Union v. Herkert & Meisel Trunk Co.*, 265 U. S. 457, at 471. It is not necessary under such circumstances to prove that the conspiracy would have had a direct effect on interstate commerce. The Indictment in the instant case charges that the appellants "knowingly" engaged in the conspiracy charged (Pars. 12-13) and that the conspiracy had the "intended" effect of, among other things, fixing the price at which fish was sold to signing dealers at arbitrary and non-competitive



levels (Par. 15). The verdict of guilty indicates that the jury found as a fact both that the appellants had the necessary intent, and that the effects of the acts were as charged in the Indictment. A person is presumed to intend the natural and probable consequences of his acts.

The contention of the appellants (Appellants' Br. 119) that a conspiracy to restrain commerce is legal unless it is intended to have a direct effect on commerce is likewise without merit for the same reason. *Coronado Coal Co. v. United Mine Workers of America*, *supra*, at 310.

I. F. (Appellants' Br. 122-123)—This contention is substantially the same as V and VI, and the answer of the Government to contention (F) is contained under those headings in this summary.

I. G., H. (Appellants' Br. 124-30)—The evidence of picketing and boycotting of the dealers was properly admitted. The Court instructed the jury that such acts in and of themselves were not contrary to or in violation of law, and that such evidence was to be considered by the jury in determining whether or not the appellants did or did not combine and conspire, as charged in the Indictment [R. 1942-3; see also R. 479]. The admission of such evidence was proper under the rule that activities or conduct which may be legal become illegal if part of, or connected with the carrying out of, an illegal purpose, plan or object. *Duplex Printing Press Co. v. Deering, et al.*, 254 U. S. 443, at 466; *Lynch v. Magnavox Co.*, 94 F. 2d 883, at 889 (9 Cir).

II. (Appellants' Br. 131-43)—It is the contention of the Government that the District Court properly excluded this evidence offered by the appellants, as it related wholly or principally to a defense of economic justification, which

is immaterial and has no application or relevancy to the issues where the appellants are charged with having engaged in a price-fixing conspiracy. Such conspiracies are illegal *per se* under the Sherman Act, and are not made legal by a defense of "economic justification." "Economic justification" evidence is likewise immaterial when the defense to the conspiracy charged is that the activities constituted the legitimate activities of either a cooperative marketing association, or a labor union. Contention D of this subheading is covered in this brief in reply to points III and I. E.

III. (Appellants' Br. 143)—The District Court properly granted the motion to quash the subpoenas *duces tecum* served by the appellants on certain witnesses, since the material sought by such subpoenas was wholly irrelevant and immaterial to the issues in the case, and related principally to the immaterial contention of the appellants that the Government must show that the conspiracy had, or if effective would have had, a direct and substantial effect upon commerce. The act of conspiring together to intentionally fix prices at any level for commodities sold in interstate or foreign commerce is without more a crime, and no direct effect on interstate commerce of the conspiracy itself need be proved in order to sustain the charges made in the Indictment. In any event, the record and evidence show such an effect in the instant case.

IV. (Appellants' Br. 144)—the contention of the appellants that the District Court erred in admitting summaries of items in books of account is without merit since the appellants were given ample opportunity to examine the books from which the summaries were made for the purpose of checking the accuracy of the summaries.

V. (Appellants' Br. 146)—The contention that the Indictment does not state a public offense under the laws of the United States is without merit since this contention is based on the fallacious assumption that the Indictment alleges facts which *per se* exempt the appellants from the provisions of the Sherman Act. No such allegations are contained in the Indictment.

VI. (Appellants' Br. 147)—The contention that the verdict is contrary to law and the evidence is likewise without merit. The Indictment does state an offense under the laws of the United States, and its allegations are sustained by the evidence in every material respect. The verdict of guilty was a proper and just verdict.

VII. (Appellants' Br. 148-201)—The contention that the panels from which the grand and petit juries were secured were illegally selected is without merit. There is no evidence in the record which shows that either the clerk or the jury commissioner intended to exclude any group or class by the methods used in securing names for the panels [R. 2524], and the record does not show that the methods of selection used in the instant case resulted in an arbitrary exclusion of or necessary discrimination against any group or class from the panels from which the grand and petit juries were selected. The appellants were deprived of no constitutional rights by the methods used in selecting the panels from which the grand and petit juries were secured in the instant case.

IV.

ARGUMENT.

The assignment of error argued in Point I of the appellants' brief deals generally with alleged error in the Court's instructions, and alleged error in refusing to give instructions requested by the appellants. The Government will herein consider those points under two headings: A. the instructions given by the Court, and B. the instructions refused. Points II.-VII., inclusive, of the appellants' brief will be considered herein under headings C.-G., inclusive, with appropriate title headings as previously indicated, and whenever practicable, the designated number or lettering given a point in appellants' brief will be placed at the left-hand side of the first paragraph in which appellants' numbered contention is herein discussed.

**A. The Instructions Given by the Court Clearly State the Applicable Law.**

It is fundamental that instructions to a jury must be construed in their entirety (*Stilson v. United States*, 250 U. S. 583, 588), and that it is not prejudicial error to refuse requested instructions where the Court has properly covered in his general charge the subject matter of the instructions requested (*Agnew v. United States*, 165 U. S. 36, 50; *Williamson v. United States*, 207 U. S. 425, 452; *United States v. Trenton Potteries Co.*, 273 U. S. 392). A reading of the entire charge given by the District Court shows that the jury was properly and thoroughly instructed as to the legal rights and liabilities of the appellants under any of the factual issues raised by the evi-

dence, and that whether the actual activities and conduct of the appellants were within the legal objectives of a fishermen's marketing association or a labor union was left to the jury.

I. D. The Court first instructed the jury that if they found that the fishermen members of the appellant Association were in fact independent businessmen, as charged in the Indictment, and that they had combined together with the other appellants to fix the price at which the individual fishermen would sell their fish to the dealers, that it was immaterial whether the price so fixed was reasonable or unreasonable [R. 1940]. This instruction covered the liability of the appellants in the event the jury found as a fact that there was a conspiracy as charged. The instructions given are supported by the following cases: *United States v. Socony-Vacuum Oil Co., Inc.*, *supra*; *United States v. Trenton Potteries Co.*, *supra*; *Ethyl Gasoline Corp. v. United States*, *supra*; *United States v. Masonite Corp.*, *supra*; *Columbia River Packers Assn. v. Hinton, et al.*, 315 U. S. 143, 131 F. 2d 89 (9 Cir.).

The contention of the appellants that the Court erred in giving the foregoing instructions is based on the contention that a conspiracy to fix prices of commodities moving in interstate commerce is not illegal *per se* unless entered into by aggregations of industrial capital. Appellants apparently contend that "working producers" may enter into price fixing conspiracies because such agreements by "working producers" cannot possibly affect "consumer" prices. It is submitted that none of the foregoing decisions endeavors to distinguish between price-fixing conspiracies entered into by aggregations of industrial capital

and those entered into by so-called "working producers," and that it is not necessary to show that the price-fixing conspiracy affected "consumer" prices in order for the price-fixing conspiracy to be illegal.<sup>11</sup>

The enactment of so-called collective marketing acts and Section 6 of the Clayton Act gave original producers of food products and commodities as well as the individual unorganized worker the right to join with others in a like classification to collectively market their products or to bargain with an employer for the terms at which they would sell their labor.<sup>12</sup> The Fishermen's Marketing Act is illustrative of the former type of special statute enacted by Congress to give fishermen the right to collectively engage in certain activities therein described, and the Norris-LaGuardia Act was enacted by Congress to supplement

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<sup>11</sup>*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

<sup>12</sup>*Columbia River Packers Association v. Hinton, et al.*, 315 U. S. 143, 145. "We think that the court below was in error in holding this controversy a 'labor dispute' within the meaning of the Norris-LaGuardia Act. That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms or conditions of employment, or concerning the association \* \* \* of persons \* \* \* seeking to arrange terms or conditions of employment' 29 U. S. C. A. §113, calls for no extended discussion. This definition and the stated public policy of the Act—aid to: 'the individual unorganized worker \* \* \* commonly helpless \* \* \* to obtain acceptable terms and conditions of employment' and protection of the worker 'from the interference, restraint, or coercion of employers of labor' 29 U. S. C. A. §102—make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities."

Section 6 of the Clayton Act to further protect the rights of labor in collective bargaining with an employer. It is submitted that in the foregoing decisions just referred to (*United States v. Socony-Vacuum Oil Co., Inc., et al.*, page 31 herein), the Supreme Court did not distinguish between price-fixing agreements entered into by aggregations of industrial capital and those entered into by so-called "original producers" or laborers who are given the right to combine together to carry on legitimate objectives authorized under the Fishermen's Marketing and comparable Acts, as well as under Section 6 of the Clayton Act. There is accordingly no legal basis for applying the so-called "rule of reason" to a charge of conspiracy to fix prices, of which the appellants have been found guilty in the instant case.

I. A. After charging the jury with respect to the rights and liabilities of fishermen to collectively organize as independent businessmen, the Court then proceeded in its instructions to cover the rights of fishermen to organize and act collectively under the Fishermen's Marketing Act [R. 1940-43]. The Court in its instructions followed the language of the Act in describing the type of association which could be formed under the Fishermen's Marketing Act [R. 1940-41], and then instructed the jury as to the type of collective action the fishermen might legally take under the Act. The Court then instructed the jury that an organization formed under the Act might enter into a contract with a buyer of fish which fixes the price "at which the association itself or as sales agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer" [R. 1942]. This was followed by an instruction to the effect that a fishermen's marketing association could not

force a dealer into a price-fixing contract by coercive activities or methods [R. 1942].

The instructions given by the Court are supported by the following cases: *Columbia River Packers Association Inc. v. Hinton, et al.*, 315 U. S. 143, 131 F. 2d 88 (9 Cir.), 34 Fed. Supp. 970, and see *Hawaiian Tuna Packers, Ltd. v. International, L. and W. Union*, 72 Fed. Supp. 562.

It is important to note that there is no evidence in the record which shows that the appellant Association itself collectively sells or “markets” any fresh fish for its members. Appellants contend, however, that what they call “bargaining” methods, ordinarily resorted to by labor unions in pursuing a legitimate labor union objective, constitute collective “marketing” under the Fishermen’s Marketing Act (Appellants’ Br. 37). They are thus in effect contending that the term “collective bargaining” means the same thing as “collective marketing” under the Fishermen’s Marketing Act. Appellants are naturally forced to argue from this contention that a “collective marketing” right under the Fishermen’s Marketing Act includes with it the right to picket and boycott a fish dealer as a labor union organization for the admitted purpose of forcing the dealer to sign a price-fixing contract of a collective marketing association. The conclusion is unescapable that under this interpretation an association can be both a labor union composed of laborers and a “marketing” association composed of independent producers at the same time. Such a combination for illegal purposes is clearly illegal. Combinations of labor and producers or businessmen to fix prices or to restrain commerce are clearly illegal under the law. *Allen Bradley Co. v. Local*



*Union #3, IBEW, et al.*, 325 U. S. 797, and related cases cited therein.

The inconsistency of appellants' position in contending that they can be both a marketing association and a labor union at the same time is obvious. It is submitted that the position of a so-called producer, such as a fisherman who, independently of any employer, catches and sells a food product consumed by the public, is entirely different from that of a laborer who sells his labor to an employer who controls his actions or conduct.<sup>13</sup> If Congress intended so-called "producers" and "laborers" to be given the same rights in enforcing legitimate objects, it would have been unnecessary for Congress to have passed any of the special statutes such as the Fishermen's Marketing Act, authorizing the formation of collective marketing organizations to sell food products, as distinguished from groups of laborers organized in labor unions.

It is important to note that the appellants have cited no authority which sustains the proposition that labor unions and cooperative marketing associations, such as organizations formed under the Fishermen's Marketing Act, are one and the same and may perform the same

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<sup>13</sup>The members of a marketing association are in effect small businessmen who are subject to the direction and control of no one other than themselves. They produce and sell their products to the consuming public. To enable him to engage in orderly selling he is permitted to combine with others in the same classification to market his products in the most effective and orderly manner. He may through an organization of like producers withhold his product from the market or sell it at a time deemed most advantageous to all the members of the association. The laborer performs his service and receives his compensation when the service is rendered and is generally subject to the direction and orders of a superior in some manner and at some time although not necessarily so at all times.

acts and engage in the same activities in carrying out the legitimate objectives authorized under the special acts.

The Court did instruct the jury concerning the right of an organization formed under the Fishermen's Marketing Act to enter into a contract on behalf of its members with a buyer of fish which fixed the price "at which the association itself *or as sales agent for its members* sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer" [R. 1942]. This phase of the instructions on a fishermen's marketing association's activities covered the right of such an organization to enter into contracts with fish dealers as a "sales" or "bargaining" agent for its members.

The real question, however, and it is one which the appellants attempt to present under their assignments I, G., and H., relates to the rest of the instruction. This part of the instruction placed a legal limitation on the activities of a fishermen's marketing association in that it provided that an association of fishermen organized under the Act cannot force an admitted price-fixing contract on a non-signing dealer by coercive methods. This part of the instruction reads:

"Such contracts must, however, be arrived at by free and voluntary negotiations between the parties thereto. I charge you that if you find as a fact that the defendant association is the type of association before described, any such contracts must be separately and voluntarily entered into and negotiated by and between the association and the buyers of fish, and that neither said association nor its members can force any buyer of fish to enter into such a contract by practices and tactics which are not free and voluntary. Such a contract entered into between the defendant association and a buyer or buyers of fish un-

der the latter circumstances would be one in which the price was fixed by one party to the contract and the price would therefore be arbitrary, artificial and non-competitive, and such a contract would be illegal and in restraint of trade" [R. 1942].

It is not disputed by the Government that an association properly organized and functioning under the Fishermen's Marketing Act may enter into contracts with individual dealers which provide for the price at which the products of the association or its members may be sold. Any such contract to be legal and valid must have the mutual assent of and be voluntarily entered into by both parties thereto. It must be the result of voluntary negotiations. Any contract entered into by either party as a result of coercive tactics, such as boycotting and picketing of the type resorted to by the appellants in the instant case, would obviously not be voluntarily entered into.

The charge given by the District Court thus clearly defined the limitation on the legitimate activities of a fishermen's marketing association. That there are legal limitations on the activities of such an association is indicated by the reasoning of the Court in the case of *Columbia River Packers Association v. Hinton*, 34 Fed. Supp. 970, where the Court stated:

"Could it be maintained that a cooperative association of any of the types of producers named, having substantial control of production in their given field, could require of all buyers that they agree not to buy from any other producers, and could forbid and prevent their members by fines and other disciplinary measures from selling to buyers who did not thus agree to buy only from members of the cooperative? Research by counsel during the week's trial and my

own research has not disclosed so extreme a claim by any cooperative marketing association in the long history of cooperatives.

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“Since the union’s contract does not guarantee a supply of fish, where would the canneries get fish, having agreed to look to the union for their sole supply. Surely reasonable men will agree that the public’s interest in an important item of food supply should not be put in such jeopardy” (at 974-5).

Language from the same opinion was quoted with approval by Judge Fee in the case of *Manaka v. Monterey Sardine Industries*, 41 Fed. Supp. 531, at 534, and see *Hawaiian Tuna Packers, Ltd. v. International L and W Union*, 72 Fed. Supp. 563.

That the special marketing acts adopted by Congress authorizing producers to unite in preparing for market and in marketing their products and to make the contracts which are necessary for that collaboration does not give such organizations “carte blanche” to do as they wish and to force their contracts on unwilling buyers is clear. If such organizations exceed the legal limits of conduct authorized by the Act, they are subject to the Anti-trust laws. See *Columbia River Packers Association v. Hinton*, *supra*. In the case of *United States v. Borden Co., et al.*, 308 U. S. 188, at 204, the Court pointed out that these special acts “cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise.” See also *United States v. King*, 250 Fed. 908; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443; *Swift and Co. v. United States*, 196 U. S. 375, 396; *Midwest Theatres Co.*

*v. Cooperative Theatres*, 43 Fed. Supp. 216, 222; *Allen Bradley Co. v. Local Union #3*, *supra*.

It becomes apparent from the foregoing cases that there is no merit to the contention of the appellants that even as a cooperative marketing organization, operating under the Fishermen's Marketing Act, the appellants had a legal right to force a contract either as "bargaining" or "sales agent" for its members on buyers by coercive activities or tactics. It is submitted that there is no language in the cases, the law, special marketing statutes, or in the proceedings of Congress preceding the enactment of such statutes, which lends support to appellants' position, or which indicates that members of such organizations as fishermen's marketing associations may do anything other than join together for the collective purpose of carrying out the legitimate objectives of "catching, producing, preparing for market, processing, handling and marketing fish caught by their members."

Under the instructions as given, the jury could have found as a fact that the appellant Association and its members were a fishermen's marketing association operating under the Fishermen's Marketing Act. This fact would still not justify a verdict of acquittal for this fact alone would not permit the appellants to conspire together to force a price-fixing contract on non-assenting dealers by coercive methods and tactics, as charged in Paragraph 12 of the Indictment.

I. B. and C. After instructing the jury concerning the rights of the fishermen as independent businessmen and as members of a market organization organized under the Fishermen's Marketing Act, the Court proceeded to instruct the jury on the rights of fishermen under the Clayton and Norris-LaGuardia Acts. In its instructions, the

Court quoted Section 6 of the Clayton Act and then instructed the jury that whether the appellants came within Section 6 of the Act was to be determined by the relationship of the appellants and members of the association to the fish dealers [R. 1943]. The Court then instructed the jury that the appellant Association would not be a labor union if its members consisted of independent producers or persons who were self-employed and engaged in business on and for their own account free from such controls as an employer ordinarily exercises over an employee. (*Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, 34 Fed. Supp. 970, note 5 at 976.) The Court continued that if the membership of the association consisted of persons who stood in the relationship of employees to the fish dealers they might legally combine together and legally carry on acts to affect changes in the terms and conditions of their employment even though such acts affected or obstructed interstate commerce, but that they might perform such acts only if there was a labor dispute between the members of the appellant Association and the fish dealers which affected the terms and conditions of their employment [R. 1944].

The Court then pointed out that if the jury found that there was a labor dispute as defined by the Court, that the terms and conditions of the employment of the members of the appellant Association by the dealers must be the matrix of any controversy or dispute between the members of the appellant Association and the dealers [R. 1944-5].

The Court then charged that if the jury found that there was not such a dispute or controversy between the members of the Association and the fish dealers and that the controversy was solely one over the price and terms and conditions at which the members should sell their fish,

and that the controversy or dispute did not involve or affect any employer or employee relationship, or was not the matrix of the controversy or dispute, that under such circumstances the members of the appellant Association would not be entitled under Section 6 of the Clayton Act to combine together to restrain trade and commerce as charged in the Indictment [R. 1945].

It is submitted that these instructions correctly stated and covered any rights which the appellants might have as a labor union under Section 6 of the Clayton Act or under the Norris-LaGuardia Act. (*Columbia River Packers Assn. v. Hinton, supra*; *Allen Bradley Co. v. Local Union #3, supra*; *United States v. Hutcheson*, 312 U. S. 219; *United States v. Brims*, 272 U. S. 549; *Truck Drivers Local #421, etc. v. United States*, 128 F. 2d 227 (8 Cir.).) See also *Hawaiian Tuna Packers Ltd. v. International L and W Union, supra*.

The contention that the Clayton Act or the Norris-LaGuardia Act by their express language or by implication *per se* exempts any association of individuals and their activities, whether as laborers or "working original producers" from the Anti-trust laws, is not sustained by any of the applicable decisions or cases cited by the appellants. In *Apex Hosiery Co. v. Leader*, 310 U. S. 469, the Court stated at 487:

"A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815, this

Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, 'Every contract, combination \* \* \* or conspiracy, in restraint of trade or commerce' do embrace to some extent and in some circumstances labor unions and their activities and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their activities, thus recognizing that to some extent not defined they remain subject to it" [Citing *Loewe v. Lawlor*, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 402, 55 L. Ed. 797; 34 L. R. A., N. S., 874; *Lawlor v. Loewe*, 235 U. S. 522, 35 S. Ct. 170, 59 L. Ed. 341; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A. L. R. 196; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551, 69 L. Ed. 963; *United States v. Brims*, 272 U. S. 549, 47 S. Ct. 169, 71 L. Ed. 403; *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791; *Local 167 v. United States*, 291 U. S. 293, 54 S. Ct. 396, 78 L. Ed. 804].

To call the members of the appellant Association "working original producers," or to give them some other descriptive title, does not bring them within or exclude them from any rights or privileges they may have under either the Clayton or Norris-LaGuardia Acts. One of the purposes of Section 6 of the Clayton Act and the Norris-LaGuardia



Act was to give individuals who sell their labor to an employer the right to combine together for the purpose of bargaining with an employer concerning the terms or conditions under which they will sell their services to the employer. It is obvious that one of the purposes of the Fishermen's Marketing Act was to give fishermen who raise or catch fish the right among other things to combine together to collectively sell their fish so that they might not be at a competitive disadvantage in selling their fish by competing with each other for the sale of their catch to dealers. In other words, the Fishermen's Marketing Act permits fishermen to pool their catch with other fishermen and to sell it collectively through an association owned and controlled by its fishermen members if they care to do so. If fishermen who work on fishing boats were selling "labor" to dealers owning and operating fishing boats, they could, of course, combine together in an association and such association as a labor union could act as a collective bargaining agency for its members in determining the price at which the members would sell their labor to the dealer. There is no evidence in the record of such relationship.

It is submitted therefore that the instructions given by the Court fully and adequately covered any rights the appellants may have had to combine together for any legitimate purpose under either the Fishermen's Marketing Act or Section 6 of the Clayton Act.

I. E. The contention that the charge of the Court with respect to the burden of proof imposed on the Government in price-fixing conspiracy cases was erroneous is likewise without merit [Appellants' Br. 118; R. 1803]. The appellants contend that the Government must prove that the alleged conspiracy *if* effective would have directly

affected interstate commerce in fresh fish. The Court charged that the Government must prove that the conspiracy was one to restrain in a substantial way the trade and commerce in fresh fish as charged in the Indictment [R. 1938]. When this instruction is read in connection with the rest of the charge, it is clear that it was surplusage and that it imposed a burden of proof on the Government that is not required in price-fixing conspiracy cases where the Indictment charges an intent to restrain interstate commerce or where the activities and conduct charged had that effect.

The Indictment in the instant case charges that the appellants *knowingly* engaged in a conspiracy to fix the price of fresh fish caught in the fishing area and sold to dealers [Par. 12 Indictment, R. 7-8] and that the conspiracy had the *intended effect* of fixing prices on fresh fish sold by the members of the appellant Association to signing dealers and of preventing fish from being sold or brought into the fishing ports for sale to non-signing dealers [Par. 15 Indictment, R. 11]. The Indictment thus charges the appellants with having conspired to fix the price of fresh fish moving in interstate and foreign commerce. It is the contention of the Government that when appellants are charged with having *knowingly* or intentionally conspired to fix the price of commodities moving in interstate commerce the amount of commerce involved in the conspiracy is immaterial, as it is the character of the restraint and not the amount of commerce involved that is made illegal by Section 1 of the Sherman

Act. *Montague & Co. v. Lowry*, 193 U. S. 38 [see also *Steers v. United States*, 192 Fed. 1, p. 5 (6 Cir.)].<sup>14</sup>

In *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, the Court pointed out at 224:

“Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under Section 1 of the Act.” [See also Note 59 on p. 224.]

The evidence in the instant case clearly shows that the conspiracy was knowingly entered into by the appellants for the expressed purpose of fixing and stabilizing the price of fresh fish caught and sold in the fishing area<sup>15</sup> and that the appellants caused the price of fresh fish sold by both the members and non-members of the appellant Association to be fixed and stabilized. Under the allegations of the Indictment, it was not necessary for the Government to prove that the conspiracy *if* effective would have had or did have either a substantial or direct effect upon the interstate commerce in fresh fish. It was sufficient, as charged in the Indictment, for the Government to prove that the conspiracy was formed for the purpose of fixing prices at some level for fish moving in interstate or foreign commerce and that it caused them to be fixed.

The cases referred to in appellants' brief are not price-fixing cases. They, therefore, do not support appellants'

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<sup>14</sup>However, the amount of fish which would have been subject to the price-fixing conspiracy in the instant case was in excess of 20 million pounds annually [Par. 10 of the Indictment; R. 6-7, 887].

<sup>15</sup>See for example the provisions of the price-fixing contract, Gov. Ex. A. attached to Indictment, Pars. (3), (4A), (4B), (4C), (4D) and R. 1387, 1562.

charge that the Court erred in giving the instructions complained of and in refusing to give the instructions requested by the appellants.

I. F. The objections of the appellants to the instructions that if the jury found that the appellants or any two or more of them had conspired to restrain interstate or foreign commerce in fresh fish as alleged in Paragraph 12 of the Indictment, any such appellants would be guilty as charged in the Indictment attacks the sufficiency of the Indictment as a whole. This contention of the appellants is substantially the same as that made in points V and VI of their brief. Since the jury returned a verdict of guilty as to all appellants, it may be assumed for the purposes of this contention, that the jury did find that the Government had proved the material allegations of the Indictment. The real question on this objection is—does the Indictment state a public offense under the laws of the United States.

It would unduly extend this brief to refer again in detail to the allegations contained in and the theory of the Indictment. It is submitted that there is no language or allegation in the Indictment which indicates that the conduct complained of therein is legal or that the appellants' activities as described in the Indictment are exempt from the provisions of Section 1 of the Sherman Act. Although the appellants make the statement that "It appears that on the face of the Indictment the subject matter thereof is a combination of fishermen, who, as working producers combined for the purpose of fixing the price of the products of their own labor" (Appellants' Br. 123), they point to no allegations in the Indictment which they contend have the legal effect of exempting the conspiracy described therein from the Sherman Act.

The foregoing statement by the appellants also assumes the existence of facts not contained in the Indictment nor the record and is the factual conclusion of the briefer. The cases previously cited by the Government clearly indicate that neither labor unions nor cooperative marketing organizations are *per se* exempted from the operations of the Sherman Act. It would unduly extend this brief to answer further this argument except to refer again to *Columbia River Packers Assn. v. Hinton, supra*; *U. S. v. Borden Co., et al., supra*; and *Allen Bradley Co. v. Local Union #3, IBEW, supra*, and similar cases, which it is submitted, support the Government's contention that the Indictment alleges a public offense against the laws of the United States under any possible theory or defense which the appellants have urged upon the Court in their brief.

I. G. and H. The Court properly instructed the jury that evidence of picketing and boycotting was to be considered by them in determining whether the appellants did or did not combine or conspire together as charged in the Indictment. It is submitted that evidence of picketing and boycotting under the allegations of the Indictment was properly admitted as bearing upon the issue as to whether the appellants had or had not conspired together as charged in the Indictment. The purpose for which the evidence was admitted was explained and properly limited by the Court both at the time of its admission and in the charge of the Court to the jury [R. 479, 1942-3]. While it may not be illegal *per se* to picket or boycott, such activity even

though legal may become illegal if part of an illegal object or purpose. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, at 469; *Lynch v. Magnavox*, 94 F. 2d 883, at 889 (9 Cir.).

Here again the inconsistent positions taken by the appellants in the instant case becomes strikingly apparent. The appellants were endeavoring to use the tactics of a labor union in picketing and boycotting the fish dealers. Picketing and boycotting activities by labor union members would probably be legal if pursued in connection with the carrying out of a legitimate labor union objective. However, such conduct might well become illegal if pursued in connection with or as part of an illegal objective.

In the instant case, whether the appellant Association is one composed of independent businessmen or of fishermen organized and operating under the Fishermen's Marketing Act, or of "working original producers"<sup>16</sup> purporting to be a labor union, the picketing and boycotting activities of the appellants, if part of an illegal object or objective, *i.e.*, the price-fixing conspiracy charged in the Indictment, would be illegal.

It is accordingly submitted that the District Court properly and thoroughly instructed the jury as to the law applicable to the issues in the case and that there was no prejudicial error in the instructions given the jury by the District Court.

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<sup>16</sup>A phrase used frequently by appellants in their brief to refer to the fishermen members of the appellant Association. See for example 1.—B.-5 of appellants' brief, p. 59.

## B. The Instructions Requested by the Appellants Were Properly Refused.

Under point I of their brief, appellants not only attack the charge to the jury as given by the Court, but they contend that the Court committed error in refusing to give certain instructions requested by appellants. The requested instructions are in substance based on the interpretation which they contend should be given to

(1) decisions of the Supreme Court on the rule of reason;

(2) the Fishermen's Marketing Act; and

(3) Section 6 of the Clayton Act.

These contentions have for the most part been heretofore discussed and answered in the previous sections of this brief. If, therefore, the District Court properly and thoroughly instructed the jury on all the issues in the case, as contended by the Government, and the instructions given covered the points raised by the appellants in any of their special requests, to such extent the District Court did not err in refusing such particular requests. If, on the other hand, the instructions requested by the appellants did not express the law, or were not applicable to any of the issues in the case, or were misleading and incomplete, such instructions were properly rejected (*Agnew v. United States, supra*, and related cases; *Holmgren v. United States*, 217 U. S. 509, at 521-524; *Erie R. R. Co. v. Purusker*, 244 U. S. 320, at 324).

I. D. 2. The instructions requested by the appellants on the so-called rule of reason [Appellants' Br., App. Q., 64-68] were not applicable to any of the factual issues raised by the Indictment, and do not state the applicable

law. The question as to whether a price-fixing conspiracy, combination or contract is reasonable or unreasonable is not one for the jury. Price-fixing conspiracies which are otherwise fully proved are *per se* unreasonable restraints, and the reasonableness of the prices so fixed or agreed upon is not a matter of inquiry. *United States v. Socony-Vacuum Oil Co., supra*.

The principal case relied upon by the appellants in support of the contention is *Appalachian Coals Inc. v. United States*, 288 U. S. 344. An examination of the opinion in this case shows that it was not a price-fixing case.<sup>17</sup> The Court held in that case that the appellants had not combined together to fix the price of coal to be sold in the market, stating: "The plan cannot be said either to contemplate or involve the fixing of market prices" (at 373) and "abundant competitive opportunities will exist in all markets where defendants' coal is sold" (at 375). The Supreme Court, however, ordered the District Court to retain jurisdiction of the cause and to "take further proceedings if further developments justify that course in the appropriate enforcement of the Anti-

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<sup>17</sup>The Government challenged the exclusive selling agency feature of the plan as affecting an unreasonable restraint of trade and an attempt to monopolize part of the trade and commerce in soft coal. As stated in the opinion, "The challenged combination lies in the creation by the defendant producers of an 'exclusive selling agency'" (at 357) which the Government contended eliminated competition among the defendants and also gave the selling agency power substantially to affect and control the price of bituminous coal in many interstate markets (p. 358).



trust Act” (at 376). Thus it clearly appears from an examination of the opinion in the *Appalachian Coals* case that it was not a price-fixing case. In the instant case the evidence is undisputed that the conspiracy involved the fixing of market prices for fish sold to the dealers in a wide market, which included all the fishing ports in Southern California where fresh fish was landed and sold.

In the *Socony-Vacuum* case, *supra*, the defendants also relied on the *Appalachian Coals* case. The Supreme Court dealt extensively with that case in its opinion, distinguishing it as a non-price-fixing case, referring to and quoting (at 215) from the language in the *Appalachian Coals* case previously quoted herein. Other Supreme Court decisions previously referred to also clearly show that the so-called “rule of reason” has no application to price-fixing cases since combinations or agreements to fix the price of commodities in interstate commerce are illegal *per se* as unreasonable restraints of trade. (See also, *United States v. Masonite Corporation*, *supra*; *Ethyl Gasoline Corp. v. United States*, *supra*; *United States v. Trenton Potteries Co.*, *supra*.)

I. A. 3. The instructions proposed by the appellants on the Fishermen’s Marketing Act [Appellants’ Br., App. I, 33-34] were likewise properly refused.

The argument in support of these instructions is succinctly stated on page 37 of the appellants’ brief, where they contended that associations may qualify under the Fishermen’s Marketing Act by engaging in collective mar-

keting only, and that “*collective bargaining*” on behalf of the members of an association is *collective marketing* under the Act.<sup>18</sup>

Here again the inconsistent position of the appellants, both as a labor union and a so-called marketing association, becomes immediately apparent. Appellants obviously confuse the legitimate activities of a labor union with the legitimate activities of a fishermen’s marketing organization. Appellants regard “collective bargaining” by a labor union and “collective marketing” by a fishermen’s marketing association as one and the same thing.

“Collective marketing” is undoubtedly a legitimate activity of a *bona fide* fishermen’s marketing association and “collective bargaining” is undoubtedly a legitimate activity of a *bona fide* labor union. It does not follow, however, that they are one and the same thing and that activities which may legally be resorted to by a labor union in enforcing its collective bargaining rights may also be resorted to by a fishermen’s marketing association in marketing or selling its products in competition with other sellers of the same product in the same markets.

If there is no difference between “collective bargaining” by a labor union and the “collective marketing” of food

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<sup>18</sup>The proposed Instruction No. 12 was obviously incomplete and deficient since it did not cover that phase of the conspiracy dealing with the efforts of the appellants to force a price-fixing contract on non-assenting dealers. The requested instruction did not, therefore, cover all the issues in the case. The proposed Instruction No. S-12 was likewise incomplete and misleading for the same reason. The word “cooperative” complained of by appellants’ Instruction No. S-13 was not used in the charge of the Court. A request to charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. *Eric R. R. Co. v. Purusker*, 244 U. S. 320, at 324; see also, *Sweeney v. Erving*, 228 U. S. 233; *Springer v. United States*, 102 U. S. 586.

products under the special marketing acts, as contended by the appellants, it was unnecessary for Congress to pass any of the special marketing acts for any labor union with farmers or fishermen among its members would be able to "collectively market" the food products raised by its farmer members or the fish raised or caught by its fishermen members. It is submitted that there is an obvious difference between an organization of food producers engaged in the production of food or the catching or raising of fish for the purpose of selling these food products to dealers or to the consuming public, and an association of individuals combined together for the purpose of collective bargaining for wages or compensation to be paid them by one with whom they have the direct or indirect relationship of employee.<sup>19</sup>

The difficulty with the appellants' requested instructions, as well as most of their other contentions, is that the appellant Association and its members were endeavoring to occupy the inconsistent position of being both a marketing association and a labor union at the same time. The result was that they were neither. There are, as above suggested, obvious distinctions and differences between the two types of organizations and the legitimate activities which either of such organizations may engage in without becoming subject to the Anti-trust laws. A further difficulty with the appellants' position in the instant case is

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<sup>19</sup>As pointed out in *Columbia River Packers Association, Inc. v. Hinton, et al.*, 34 Fed. Supp. 970, at 976, footnote 5: "The ideological foundation of American trade unions distinguishes between those who work for wages or salaries and independent producers or those who are self-employed, and the entire labor movement has been built on that distinction." One who sells fish and one who sells his labor are obviously not in competition with each other in the same market or with the same product.

that if the appellants were either a marketing or labor organization, their activities exceeded those lawfully permitted either type of organization under either the Fishermen's Marketing or Clayton Acts.

The cases relied upon and cited by appellants do not support the requested instructions. For example, the Court assumed in the case of *U. S. v. Dairy Cooperative Association*, 49 Fed. Supp. 475, that the defendant Association was a farmers' cooperative organization. The opinion gives no facts which indicate the basis of the assumption. It, therefore, does not indicate what constitutes a legal organization under the farmers' marketing statutes and what the legal limits are on the activities of organizations formed under the Fishermen's Marketing Act.

In *Columbia River Packers Association v. Hinton*, 34 Fed. Supp. 970, the Court treats the defendant Association as a cooperative association organized under the Fishermen's Marketing Act but the opinion of the Court provides no legal test as to what constitutes a fishermen's marketing association under the Act. In this opinion, the Court recognizes, but passes without comment the inconsistent position taken by the defendants in that case where they claimed, as in the instant case, that they were both a labor union and a fishermen's marketing cooperative association. In the unreported decision referred to on page 43 of the appellants' brief as *U. S. v. Columbia River Fishermen's Protective Association*, the Court again assumed that the association there involved was a fishermen's marketing cooperative without indicating what was legally necessary in order to constitute an association or "marketing" organization under the Fishermen's Marketing Act.

*Liberty Warehouse Co. v. Burley Tobacco Growers Association*, 276 U. S. 71, did not involve an organization formed under any of the Federal collective marketing acts. It is accordingly of no assistance to the Court in interpreting or construing any of the Federal cooperative marketing acts, particularly the one involved in the instant case. *Stark County Milk Association v. Tabeing*, 129 Ohio State 159, 194 N. E. 16, and *Johnson v. Georgia-Carolina Retail Milk Producers Association*, 182 Ga. 295, 186 S. E. 824, are likewise cases which involved activities conducted pursuant to state marketing acts. These decisions are neither persuasive nor obligatory authority in this Court. Such decisions cannot and do not aid the Court in any way in interpreting the Fishermen's Marketing Act or the legal limitations, if any, that are imposed on the activities of associations formed under such acts by Section I of the Sherman Act.

I. B. 3. The third set of instructions requested by the appellants [Appellants' Br., App. M, 42-48] was properly refused. These instructions related principally to the contention of the appellants that they were not guilty because their conduct, which would otherwise constitute a crime under the Sherman Act, was purged of any illegality thereunder by the provisions of Section 6 of the Clayton Act. Their argument, in support of this contention, is succinctly stated on page 74 of their brief wherein they suggest that an employer-employee relationship might exist between the fishermen and the dealers if there was basically a sale of labor plus a lack of equal bargaining power, even though the fishermen might be independent contractors.

An examination of this set of requested instructions shows that they are open to the same general objections previously made to substantiate all of the requested in-

structions (page 49 *et seq.*). They are replete with general terms that are ambiguous in meaning unless specifically defined in the instruction in which they are used. The instructions constantly refer to such terms as workers, laborers [No. 18], agriculturists [No. S-4], mutual help, legitimate objects [No. S-6], economic groups [No. S-10], independent contractors [No. S-8], etc., which are nowhere defined or described in the requested instruction. It is submitted that the failure to define the meaning of such general and ambiguous terms would in and of itself justify the Court in refusing the requested instructions, since they could only serve to confuse the jury as to the issues in the case. Further detailed objections might be urged in opposition to the ambiguous and general language of each of the requested instructions, as well as to their incompleteness and improper application to the issues in the instant case. It is submitted, however, that even a cursory reading of the instructions requested shows that many portions of the instructions are ambiguous and misleading and that they did not properly cover or relate to the issues in the case.

Many of the cases cited by the appellants in support of these requested instructions have been previously discussed and referred to, and it would unduly extend this brief to again discuss such cases. It is submitted, however, that such questions as to whether or not a fisherman obtains legal title to fish caught by him in coastal waters could not possibly be involved in or applicable to any of the issues raised by the Indictment. Cases which might possibly support such a proposition of law or issues of fact as those referred to on page 57 of appellants' brief will therefore not be further commented on.

The case of *Hopkins v. United States*, 171 U. S. 578, cited by appellants, relates to an agreement between live-stock commission merchants and charges made for services rendered. The case is cited by the appellants apparently for the proposition that personal services are not covered by the Anti-trust laws. The sale of personal services is not involved in the instant case and if it were, see the recent case of *American Medical Association v. United States*, 317 U. S. 519, *contra*. The case of *Anderson v. United States*, 171 U. S. 604, involved an agreement by dealers who bought and sold cattle. The Supreme Court especially reserved the question in that case as to whether the combination had fixed prices and if it had done same, whether it would have gone scathless.<sup>20</sup> The Supreme Court in the *Hinton* case, 315 U. S. 143, points out as a matter of law that on facts substantially the same as those of the instant case any dispute between the dealers and the fishermen related solely to the price at which the fishermen would sell their fish to dealers. No sale of "services" by fishermen to the dealers could possibly be involved as a jury question in the controversy in the instant case under this Supreme Court ruling.

The Labor Relations Act cases cited by the appellants are of no assistance in determining whether on the record in the instant case the fishermen do in fact stand in the relation of employee to the fish dealers and, if so, whether a labor dispute exists between the dealers and the fishermen under the Norris-LaGuardia Act; or whether the controversy between the dealers and the fishermen related

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<sup>20</sup>See also *Live Poultry Dealers' Protective Association, et al. v. United States*, 4 F. 2d 840, at 842 (2nd Cir.), for further discussion of both the *Hopkins* and *Anderson* cases.

solely to the price or terms and conditions at which the members of the appellant Association would sell their fish to the dealers. The record fails to show any dispute between the members of the appellant Association who own and operate fishing boats and members who were fishing on such boats as to the share of the catch to be allocated among themselves. Such a dispute might possibly be a "labor dispute" under the Norris-LaGuardia Act but that question is not presented in this case.<sup>21</sup> It is accordingly submitted that the cases cited by appellants do not support these requested instructions and that they were properly refused by the District Court.

I. E. 2. The objection of the appellants to the instruction covering the burden of proof imposed on the Government that the conspiracy, if effective, would have directly affected interstate commerce has been previously considered on page 44 *et seq.*, herein and it would unduly lengthen this brief to refer to it further.

It is accordingly submitted that the instructions given to the jury by the District Court correctly stated the law applicable to the issues and evidence in the case and that the District Court properly denied the mass of special instructions requested by the appellants.

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<sup>21</sup>See charge of Court [R. 1943] where the Court read the provisions of Section 6 of the Clayton Act to the jury and then said: "In connection with this phase of the matter, it is immaterial whether or not a defendant or any other member of Local 36 owned and operated his own boat or fished for a share of the lay. The matter of whether or not the defendants come under Section 6 of Clayton Act is to be determined by the relationship of the defendants and members of Local 36 to the fish dealers and not to one another or to any other person."



### C. The Court Properly Rejected Certain Evidence Proffered by the Appellants.

II. A., B., C. This assignment of error deals with the rejection by the District Court of certain evidence offered at the trial by appellants. It was contended at the time the evidence was offered that it was relevant to show the nature of the appellant Association; the applicability of Section 6 of the Clayton Act; the application of the rule of reason; and that fish dealers other than those picketed and boycotted by the appellants did and were able to buy all the fresh fish they desired. It is submitted that this evidence was properly rejected as irrelevant and immaterial and as not tending to prove or disprove any of the issues of the case.

The evidence offered by the appellants and rejected by the Court is described in appellants' brief on pages 131-132, 133-135, 136-140, 142-143. The appellants contend that the rejected evidence was material to show among other things that the appellant Association conducted activities relating to the marketing process; that organizations referred to by appellants as "collective bargaining associations" constitute an established and recognized form of "collective marketing organization"; that from an historical and economical point of view, fishermen have organized to bargain for the fish they catch in order to have a voice in the amount that they are paid for their labor; and that appellants' conduct involved merely a local controversy which had no impact upon interstate or foreign commerce.

II. A. 1. An example of the type of evidence contained in this proffer is that of the appellant Kibre, which is described in detail on page 132 of the appellants' brief. This proffer related to so-called "marketing" experiments

by the appellant Association in 1942 regarding the canning of barracuda. It is submitted that such evidence could in no way aid the jury in determining whether or not the appellants had engaged in a price-fixing conspiracy as charged in the Indictment, or what the true character of the appellant Association was in 1946.

The proffered testimony of the economic expert, John B. Schneider, concerning farming organizations and the similarity between the economic position of a farmer and a fisherman, and that agricultural marketing associations do not result in evils which usually flow from monopolies, was in the nature of "economic justification" evidence. It was offered to justify the acts of the appellants in conspiring to fix the price of fish caught by the members of the appellant association and to force the fish dealers into a contract establishing the prices to be paid by the dealers. Such evidence is not material when the charge is price-fixing, for reasons previously given.

II. B. The evidence described in B., 1., a. to f., inclusive, (Appellants' Br. 133-135) was of a similar character to that previously referred to and was likewise properly rejected by the Court as irrelevant and immaterial. An examination of the documents, Exhibits P and Q, shows that any material contained therein was obviously irrelevant and immaterial as well as self-serving. The Exhibits X and X-1 offered in evidence were copies of the National War Labor Board rulings holding that prices paid to fishermen under the circumstances involved in those cases constituted wages for the purpose of applying the provisions of the War Labor Board Act. It is submitted that such documents could likewise have no bearing on the issues in the instant case.

The general proffer of proof [Exhibit TT] contained nothing more than a mass of irrelevant material, some of which is described on page 135 of appellants' brief. Testimony to the effect that fishermen on the Pacific Coast have been organized on a labor union basis since 1886 would throw little light on the question of whether the appellant Association in the instant case was a *bona fide* labor union and, if so, whether the activities of its members in the instant case could be classified as within the legitimate activities of a labor union.

Fishermen might well be organized into labor unions under certain circumstances in order to bargain with the crew or operator of the boat on which they work for their compensation. But the evidence in the instant case, as in the *Hinton* case, 315 U. S. 143, shows that some of the appellants were boat owners and operators who as members of appellant Association had joined in the conspiracy to get higher prices for fish caught and sold to dealers. It is obvious that under such circumstances the boat owner would benefit from the conspiracy since the boat owner gets a share of the catch as well as the fishermen who fish therefrom.

Evidence that other agreements had been entered into between other associations and fish dealers would likewise be of no assistance to the jury or to the Court in determining the liability of the appellants in the instant case. Such evidence could only serve to present and raise collateral and confusing issues. The admission of this type of testimony would also necessarily have required the Government to present evidence as to the activities and true character of the organizations which were parties to such contracts in order to determine the similarities and

differences between such organizations and their activities and those of the appellant Association.

Even if the circumstances surrounding the execution of such contracts and their authorities were identical, such evidence would not legalize the action of the appellants in the instant case, for it is fundamental that a violation of law by one party is no defense to an action brought against another party committing the same offense. The fact that the Maritime Conciliation Service had participated in negotiations between other organizations and other buyers of fish would likewise be wholly irrelevant to the issues in the instant case.

Other evidence contained in Proffer TT which related to the fluctuation in the prices received by the fishermen, as well as evidence of the earnings of fishermen, would likewise have no bearing on the issues in the instant case. The proffered conclusions in the "Schneider offer of proof" that a fisherman is a "laboring producer" as distinguished from a capitalist and entrepreneur would likewise be irrelevant and immaterial evidence as being the conclusions of the witness and also improper as falling within that properly excluded as "economic justification" evidence. The question of whether or not the employer-employee relationship existed between the dealers and the fishermen was presented to the jury under proper instructions but its determination by the jury depended upon what the appellants themselves did in the instant case and not on what some other group or organization had or had not done.

Appellants contend that evidence of the foregoing character was relevant as tending to establish the fact that historically and from an economic point of view fishermen

should organize to bargain for the fish they catch. There is, of course, no legal objection to anyone organizing fishermen, if they wish to be organized. The Fishermen's Marketing Act permits them to organize or to be organized for the purposes therein stated. In the event any fishermen are employed or stand in the relation of employees to any employer, they likewise have a right to organize or to be organized, if they wish, as a labor union. But evidence of the actions of other labor unions or associations of fishermen, or decisions of administrative tribunals, such as the War Labor Board, could certainly by no stretch of the imagination be of any assistance to the jury in the instant case in determining the guilt or innocence of the appellants of the charges made in the Indictment.

II. C. The same answer applies and can be given to the appellants' contention that evidence which they contend related to the rule of reason was improperly excluded. Here again the proffered evidence (Appellants' Br. 136-140) dealt principally with the economic background of the fishing industry as a whole and a comparison between fishermen and farmers. It is submitted that such broad and general testimony as was contained in the appellants' proffer, and as described in their brief, was clearly irrelevant to the issues in the instant case, where the only real question presented was whether the appellants had entered into a price-fixing conspiracy as charged in the Indictment.

The evidence proffered could not legalize or immunize the conduct of the appellants against the charges contained in the Indictment. *United States v. Socony-Vacuum Oil Co., et al.*, and related cases, *supra*. The cases cited by the appellants in support of the admissibility of evidence of this character have been previously considered and do

not alter the rule of the foregoing cases. In fact, some of the cases, such as *Chicago Board of Trade v. United States*, 246 U. S. 231 (Appellants' Br. 141), cited and relied upon by the appellants in support of the admissibility of the proffered evidence in the instant case, were also relied on by the defendants in the *Socony-Vacuum* case. The Supreme Court stated in its opinion in the *Socony-Vacuum* case, *supra* (at page 214) that cases of the character of *Chicago Board of Trade v. United States*, *supra*, have no application to combinations operating directly on price or price structures.

The evidence in the instant case is conclusive that the price-fixing conspiracy described in the Indictment operated directly on and affected the price of fish sold to dealers at the wholesale level. The record clearly shows that the purpose of the conspiracy and of appellants' actions was to stabilize and fix the price at which the individual fishermen would sell their fish to the dealers. The cases cited by the appellants in support of the admissibility of the proffered evidence accordingly have no application in the instant case.

II. D. The proffered evidence that the 1946 catch of fresh fish for Southern California was three times as high as the 1942 catch; that the percentage of fresh fish caught and sold to dealers was a small part of the total catch of all fish caught in waters off Southern California, and similar evidence, was likewise properly rejected as irrelevant and immaterial. The appellants contend that such evidence was material as indicating that the controversy was a local one.

The price-fixing conspiracy described in the Indictment related only to fresh fish sold to dealers and did not involve any attempt to fix the price of fresh fish sold to

canners. However, the Indictment alleges and the evidence shows that over 20 million pounds of fresh fish are caught in the fishing area and sold annually to dealers at the fishing ports to which the conspiracy applied. The amount of fresh fish that may actually have been caught for the entire year of 1946, and the proportion of the entire catch which may have been sold to canners, certainly does not tend to prove or disprove the principal issue in the instant case as to whether the appellants did or did not conspire to fix the price of fresh fish sold to dealers in the Southern California fishing ports.

The fact that other fresh fish dealers at other Pacific Coast fishing ports or elsewhere, who were not picketed or foreclosed from a source of supply by appellants' activities, may have purchased fish from sources other than the appellants or were able to secure fresh fish during the so-called strike is likewise immaterial. It is not in dispute that dealers who signed the price-fixing contract with the appellant Association were able to and did secure fresh fish during the so-called strike. It is likewise not in dispute that non-signing fish dealers at San Pedro and Newport Beach did not and could not secure any fish at their usual place of business during the period of the so-called strike. Evidence of the latter character was clearly admissible to show the existence, terms and effect of the conspiracy described in the Indictment. As previously suggested, however, the fact that other fresh fish dealers were able to secure fresh fish during the so-called strike, or that a large amount of fresh fish was caught in coastal

waters off Southern California in 1946 does not tend to prove or disprove the existence of the conspiracy charged in the Indictment.

It is accordingly submitted that the Court properly excluded the evidence proffered by the appellants, and described in detail on pages 131-140, 142-3, of the appellants' brief.

#### **D. The Court Properly Granted the Motion to Quash the Subpoenas Duces Tecum.**

III. If the evidence which the appellants sought by the subpoenas was irrelevant or immaterial, or otherwise incompetent, there was no error in granting the motion to quash the subpoena. The proffer of the evidence which the appellants suggest would have been secured by the subpoenas *duces tecum* quashed by the order of the Court on April 18, 1947 is in the same category and classification as that described and dealt with under part C herein which the District Court properly rejected.

The evidence contained in this proffer was to the effect that a much larger quantity of fish comes in from areas outside Southern California than is caught in the fishing area involved in the conspiracy; that the price paid the fishermen for fish caught fluctuates considerably and bears no relationship to the amount charged for the fish sold by the dealers; that the price paid by the dealers in the various Southern California ports to the fishermen is substantially the same; and that fresh fish dealers in Southern California, other than those picketed and boycotted by appellants, were able to buy all the fresh fish they desired or could handle during the period of the so-called strike.

As previously suggested, the evidence referred to in this proffer has for the most part been considered under part



C (p. 59, *et seq.*) of this brief and to that extent will not be again considered herein. It is submitted that this proffered evidence is likewise irrelevant and immaterial and could only tend to confuse the jury and the issues of the case and would be of no material help to the jury in deciding the factual issues in the case. The evidence proffered is for the most part of the type that might be classified as that offered in support of an "economic justification" defense or in support of appellants' contention that the Government must show the direct effect on interstate commerce of the conspiracy described in the Indictment. The Government submits that the Indictment charges and the record shows that the trade and commerce which was the subject matter of the conspiracy was fresh fish in the approximate amount of 20,000,000 pounds annually. Both contentions have been previously considered and answered. The Government submits, therefore, that the motion to quash the subpoenas was properly granted as the evidence proffered thereunder would have been properly excluded.

#### **E. The Court Did Not Err in Admitting Summaries of Items in Books of Account.**

IV. It is submitted that this assignment of error is likewise without merit. The appellants were given an ample opportunity to examine the records from which the summary [Gov. Ex. 6] was made. The Court, however, did limit the inspection of the records by the appellants to that reasonably necessary to check properly the accuracy of the figures contained in the summary. The appellants, however, were not satisfied with a limited examination of the originals of the books of account. At the time the original records were submitted to the appellants for their examination in order to check the accuracy of the sum-

mary, they insisted that they had the right to examine the records *for any purpose*. The records in question contained the names of customers, etc., of the witness producing the same as well as records of sales made. The appellants were given every opportunity to examine the records for the purpose of checking the accuracy of the compilation prepared from the books of account.

It is submitted that a party is not entitled to inspect the original records from which a compilation is prepared for any purpose he may desire but that his examination of such records is limited to such as may be necessary to enable him to check the accuracy of any compilations prepared therefrom. To hold otherwise would permit an examining counsel to secure information as to customers, lists, etc., which in no way relate to the issues of the case or the purposes for which the compilation was submitted and offered in evidence. The compilation or summary here involved showed the total purchases and sales of fresh fish of the witness for the period July 15, 1945 to July 15, 1946, and indicated that the business of the witness was interstate in character and of a substantial volume. It was offered to corroborate the testimony of the witness and for the purpose of showing the amount of fresh fish landed at the wharf of the witness for the calendar year preceding the month of July 1946; the sales of fresh fish by the witness in and outside the State of California for the same period; and the fact that no fish were landed at the wharf of the witness or purchased by him at his usual place of business during the period of the so-called "strike" [R. 181-7]. It is submitted that any examination of the records from which the compilation was made, was properly limited by the Court in the exercise of its discretion to that necessary to enable the appellants to

determine the accuracy of the figures contained in the compilation. As suggested, however, the appellants contended that they had a right to examine the original records for any purpose whatsoever. To sustain their contention would obviously result in extending the examination permitted beyond the scope of that for which the compilation was offered and admitted. The Court was accordingly correct in refusing the appellants the right to conduct an *unlimited* examination of the original records in question.

The cases indicate that the purpose of allowing the inspection of the original records is to ascertain the correctness of the summary. Nothing in the cases supports the appellants' contentions that this inspection can be used as a means of discovery or that the opposing party can engage in a "fishing" expedition by an unlimited examination. *Augustine v. Bowles*, 149 F. 2d 93-96 (9 Cir.); *Harper v. U. S.*, 143 F. 2d 795 (8 Cir.). The case of *U. S. v. Mortimer*, 118 F. 2d 266 (2 Cir.), cert. den. 314 U. S. 616, relied on by appellants, does not support their contention. It merely states the general rule that the original records from which summaries are made must be made available for inspection to the opposing party. It does not hold that they must be made available for purposes other than to check the accuracy of a compilation prepared therefrom. In fact, there is authority for the proposition that where only the *net result* of the account books is desired, as in the instant case, that this fact may be proved by evidence independent of the records themselves. 4 Wigmore (3rd Ed.), §1244-7, p. 467-75. Under this rule, the Government could probably have dispensed with the production of a summary and relied on the testimony of the witness as to his approximation of the figures

as indicating the net results of the witnesses' books of account. This is but another reason which indicates that the ruling of the Court was not erroneous, or if so, that it was not a material or prejudicial error.

**F. The Indictment States a Public Offense Against the Laws of the United States. The Verdict and Findings Are Sustained by the Law and Evidence.**

V-VI. An examination of the appellants' brief in support of parts V. and VI. (Appellants' Br. 146-47) shows that the brief contains merely a statement of the contention without any extended argument or authority. The contention made under these assignments is substantially the same as that previously made by the appellants in their point I.-F. and previously answered by the Government herein on pages 46 and 47, namely, that a combination of fishermen who are "working original producers" for the purpose of fixing the price of the product of their own labor is exempt from the Anti-trust laws by the provisions of the Fishermen's Marketing Act and Section 6 of the Clayton Act. It would unduly extend this brief to restate again the answer of the Government to these contentions which we submit are wholly without merit.

The verdict of the jury must be sustained if there is substantial evidence to support it, taking the view most favorable to the Government. *Glasser v. United States*, 315 U. S. 60, 80.

As is stated by the Court in *United States v. Sorrentino*, 78 Fed. Supp. 425, at 428:

"In considering the sufficiency of the evidence to sustain the verdict of the jury, this court must take that view of the evidence which is most favorable to the government; must give to the government the

benefit of all the inferences which reasonably may be drawn from the evidence; and must refrain from concerning itself with the credibility of witnesses and the weight of the evidence.”

It is submitted that under the foregoing rules of law the verdict of the jury in the instant case is clearly sustained by the weight of the evidence and this assignment of error is accordingly wholly without merit.

**G. The Panels From Which the Grand and Petit Juries Were Secured Were Properly Selected.**

VII. A., B., C. The question presented by this assignment of error is raised by the defendants’ motion to dismiss the Indictment on the grounds that the grand jury which returned the Indictment was improperly selected and that there were material departures from the form prescribed by law in the matter of the drawing and selection of the grand jury, in that it was drawn in such a manner that it was not an impartial grand jury drawn from a cross-section of the community, but that certain defined groups of the community, to-wit: laborers, people working by the day or hour, members of labor unions and Negroes were systematically and intentionally discriminated against and were excluded from the list of persons to serve as grand jurors. The motion recited that the defendants fall within the classes of persons which were so systematically and intentionally excluded from the list of persons selected to serve on the grand jury. The defendants also moved that the trial jury panel be stricken out in its entirety on the basis of the same allegations as were made with respect to the grand jury [R. 25-28].

The motions were denied by the trial Court [R. 28-29, 2573] after extensive testimony [R. 1968-2523], for reasons set forth in an opinion in which the evidence was reviewed and coordinated to the law of the subject [R. 2523-2573].

The burden of proof on the hearing of such a motion is on the moving party.

“Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant.” *Fay v. New York*, 332 U. S. 261, 285.

The questions raised by the defendants’ motions involved issues of fact and law. However, certain questions were exclusively questions of fact, such as whether the clerk or jury commissioner showed any bias or prejudice in the selection of names or sources of names of prospective jurors; whether they systematically or intentionally or arbitrarily excluded any person or persons, or groups or classes of persons, either on account of or because of economic status, occupation, rate or quantity or method or time of pay, race, religious, sex, social connections or affiliations, or lack of them, or political affiliations; and whether the system and method or process used by the clerk and commissioner result in such exclusion.

The trial Court determined these factual issues adversely to the appellants [R. 28-29, 2573], and the trial Court’s determination in this respect is entitled to the same respect as is the determination of any other question of fact committed to it. Its findings of fact must be affirmed if there is any substantial evidence to support them. *Reynolds v. United States*, 98 U. S. 145, 156; *Spies v. Illinois*, 123 U. S. 131; *Green v. United States*, 19 F.

2d 850 (9 Cir.). By statute, the trial Court is given the exclusive right and duty to determine these questions of fact. “\* \* \* all challenges, whether to the array or panel, or to individual jurors for cause or favors, shall be tried by the court without the aid of triers.” 28 U. S. C. A. §424, Jud. Code §287.

There is ample evidence in the record to support the findings of fact and the trial judge, and his interpretation and application of the law was without error.

**(1) There Was No Systematic, Intentional or Arbitrary Exclusion of or Discrimination Against Any Person or Persons, or Against Any Groups or Classes of Persons.**

The trial and grand jurors were selected from the same sources by the same procedure [R. 1968]. The jury commissioner furnished most of the names, though some were supplied by the clerk [R. 1986-7]. A master card file containing between 25,000 and 30,000 names of prospective jurors has been compiled over a period of years, and there are no memoranda accompanying the names in this file which indicate the race, color, religion or occupation of the prospective jurors [R. 1999-2000]. The addition of names to this master file has been a continuous process since about 1925 [R. 2027].

The sources from which the names have been selected have been diverse. In recent years, some of the sources have been:

The Los Angeles County Telephone Directory [R. 2138-9; 2141, 2145, 2148-9];

A list of registered automobile owners [R. 2145];

A small number of names from women's clubs known as the Friday Morning Club [R. 2124, 2137] and the Ebell Club [R. 2137, 2141];

The Congress of Parents and Teachers [R. 2144];

The Southwest Blue Book, a social register [R. 2129, 2146, 2159-60];

Lists of names supplied by some Railroad Brotherhood Unions [R. 2130];

Lists of Negroes supplied by a Negro deputy clerk [R. 2067];

A list of Negroes from a Negro minister [R. 2150-1];

Personal property assessment lists [R. 2150];

A list of Chinese-Americans compiled by the clerk from naturalization proceedings [R. 2070];

A few names of Japanese-Americans supplied by a minister [R. 2152, 2164].

In the early 1930's, the jury commissioner secured a few hundred names from the following sources, which have not been used during the last fifteen years:

The labor temple [R. 2173];

The Los Angeles Country Club [R. 2150];

The University Club [R. 2126];

A list of tellers and employees of banks [R. 2494].

The clerk has never failed to make a card for any prospective juror on the ground or for the reason that he was a laborer working by the day or that he was a member of a labor union, and the lists contain many such persons [R. 2088-9]. Neither has he withdrawn a name because the prospective juror was a Negro [R. 2089]. There was a Negro on the grand jury panel under attack. A Negro served on the September 1946 Grand Jury. Negroes served on trial juries in that same term of court.



Negroes have served on grand and petit juries [R. 2001-2003].

The jury commissioner denied any discrimination against any person or class or group of persons on the ground that he or they were laborers, or because of occupation or pay or rate of pay or time of pay, or race, or because of union membership, or occupation [R. 2172]. The clerk testified to the same effect [R. 2094-5].

The telephone book was the source of nearly 5000 names out of approximately 7000 names supplied by the jury commissioner since 1943 [R. 2136-2160]. The jury commissioner had no means of determining the occupation, color or economic class or occupation of any person selected from the telephone book or from most of his other sources of names [R. 2172].

There certainly was no intentional handpicking of jurors from selected economic classes in taking names from a telephone book, a published list of registered automobile owners and personal property tax lists.

The selection of names for jury service is the responsibility and duty of the clerk and the jury commissioner. *Glasser v. United States*, 315 U. S. 60; *Walker v. U. S.*, 93 F. 2d 383 (8 Cir.); *United States v. Murphy*, 224 Fed. 554. Courts have no right to tell the clerk and jury commissioner how to discharge the duties and responsibilities imposed upon them by law, but have the power only to declare their actions null and void for malfeasance or misfeasance. *United States v. McClure*, 4 Fed. Supp. 668.

There is a presumption of regularity in the actions of the clerk and jury commissioner which must be recognized by the courts, and this presumption has not been overcome by the evidence in this case. In *Lewis v. United States*, 279 U. S. 63, 73, the Supreme Court said:

“\* \* \* as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown.”

The testimony of the clerk and the jury commissioner positively established a lack of intention to exclude any classes of persons from the jury lists. The only evidence as to the intentions of the clerk and commissioner shows that they intended to broaden, and not to restrict, the representation of various classes of persons on the panel. Their efforts to secure the names of citizens of Chinese and Japanese ancestry, Negroes, representatives of labor unions, and their use of telephone directories as a principal source of names, indicates a desire on their part to insure the representation of minority groups and to have as many types of citizens as possible on the jury lists. There is an utter and complete lack of any proof that the clerk and jury commissioner intended to exclude any classes of persons, or deliberately utilized a system designed or effective to accomplish this result.

(a) THE TESTIMONY OF APPELLANTS' EXPERT WITNESS  
FAILED TO PROVE DISCRIMINATION.

Appellants' expert witness, Robinson, testified that a comparison of the ratio of persons in the twelve major classifications of employment in the 1940 Census of Los Angeles to persons in these classifications in the 1946 and 1947 jury panels and juries demonstrated that there were an insufficient number of jurors in certain employment classifications, and that the method of selection of jurors therefore was not such as to secure juries which properly represented a cross-section of the community in so far as economic classification was concerned [R. 2226-50, 2254-2325].

The weight which should be given to this testimony depends upon the validity of appellants' premise that the 1940 Census Report establishes an ideal classification of persons by economic groups or classes, and that the extent of variance therefrom in the composition of juries demonstrates the extent to which the procedure in selecting the juries departs "from the form prescribed by law in the matter of the drawing and selection" of jury panels.

This basic premise of appellants is fatally defective. Census Bureau employment classifications are not established upon the basis of income or economic status, but upon the characteristics of the kind of employment [R. 2228]. Furthermore, the relative percentage of persons in each Census employment classification has no relationship to the percentage of eligible jurors who may be found in each classification [R. 2253-4, 2334-5].

As the trial judge pointed out in his decision, it is impossible to conclude that persons who are included in the category of "professional and semi-professional" neces-

sarily fall into any recognizable or identifiable economic class, either by reason of incomes or their economic and social thinking. Defendants have made no showing, and indeed it would be impossible to make a showing that artists, art teachers, trained nurses and student nurses, professional workers, dancers, athletes, actors, social and welfare workers, and other professional and semi-professional workers (all of whom are included in one generic classification so far as appellants' analysis is concerned) all have similar incomes and economic views, or that they are in a different economic class than appellants, or that they would be biased and prejudiced against the appellants because of a difference in economic status [R. 2543-4].

Similarly, appellants made no showing that railroad conductors, government officials, managers of garages and dry cleaning shops, owners of grocery stores and restaurants, and railroad presidents (all of whom fall in one Census classification) possess any common economic status or views or comparable income or social outlook on life, and that even if it existed, it would be so different from that of appellants to result in prejudicial bias against them.

The number of persons falling into each Census Report classification of occupation has no relationship to the number of persons in each occupation classification who are eligible for jury service [R. 2253-4, 2334-5]. Appellants can hardly carry their argument so far as to contend that a jury must contain representatives of classes of persons who are not eligible for jury service, as that would be a patent impossibility. The Census Report includes in the various job classifications an unknown number of aliens, minors, and persons who were not in California for a sufficient time to become eligible for jury

service [R. 2254]. This fact militates against the acceptance of the number of persons in each job classification as the perfect or ideal standard for the composition of a jury panel.

Since appellants' testimony [R. 2271-84, 2313-4, 2318-9, 2403, 2417-8] rests upon the premise that a deviation in juror employment classification from the ratios in the Census Reports shows that the method of selection of juries was improper, they should first have established the validity of the necessary preliminary premise—namely, that the ratios in the Census reports were ideal for jury service. This they failed to do.

The trial Court made an independent examination of the same questionnaires which were the basis of the testimony and conclusions of defendants' expert witness [R. 2535]. The trial Court found that 165 out of 167 occupations listed in the Census Report were represented on the 1946 and 1947 jury panels [R. 2554]. This fact certainly justified the trial Court's finding [R. 2573] that there had not been any intentional and systematic exclusion of jurors on the ground of their occupation, and that the method of selection which was followed by the clerk and commissioner resulted in an extremely wide and complete diversification of employments represented on jury panels.

In addition, appellants contended (Appellants' Br. 173-4) that in excusing jurors, the judges excused too many in the lower economic classifications, and thus aggravated the defects which they contend were inherent in the method of selection of the jury panels. It is not clear whether appellants contend that the judges, by indiscriminate excuses, have been guilty along with the clerk and

commissioner, of “systematically and intentionally” discriminating against those classes of persons mentioned in appellants’ motion.

The appellants’ witness stated further that the use of questionnaires, recommend by the Conference of Senior Circuit Court Judges, contributes to this same result, in view of the fact that more people in higher economic classifications would respond to the questionnaires than would persons in lower classifications [R. 2395-7]. It appears to be their belief that it was the duty of the judges in excusing jurors, to excuse more of those in higher economic classifications than in lower ones, and that to this extent, the discretion of the judges in excusing jurors was limited and had been abused.

These contentions demonstrate how far appellants have departed from a reasonable concept of the meaning of the words “systematic and intentional discrimination.” There is no difference, with respect to intent or end result, between the action of the jury commissioner in selecting names from the telephone book, and the action of the judges in excusing jurors who were members of lower economic classes. There is no contention by appellants of any improper motivation or evil intention on the part of the commissioner, the clerk, or the judges. However, appellants appear to contend that the actions of all of them contributed to the lack of impartiality complained of, from which appellants deduce that the jury panels were improperly selected and that there were departures from the form prescribed by law in the matter of drawing and selection of juries.

(b) THE PRESUMPTION OF REGULARITY IN THE METHODS USED IN SELECTING THE PANEL HAS NOT BEEN OVERCOME.

The burden is upon appellants to establish that there were material departures from the form prescribed by law in the matter of the drawing and selection of the grand jury and the petit jury. To do so they must overcome a presumption of regularity in the activities and operations of the clerk and jury commissioner. The existence of this presumption is well established. In *Lewis v. United States*, 279 U. S. 63, 73, the Supreme Court said:

“\* \* \* as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. It is the settled general rule that all necessary prerequisites to the validity of official action are presumed to have been complied with, and that where the contrary is asserted it must be affirmatively shown.”

Appellants have not carried this burden of an affirmative showing to overcome the presumption of regularity.

Appellants do not rely upon any direct evidence of deliberate and intentional discrimination by the clerk and commissioner. Instead, they argue that they were entitled to a jury drawn from a panel upon which laborers, people working by the day or hour, members of labor unions and negroes would be represented by approximately *the same proportion* of members of those classes as exist in the community. They contend that a failure of the clerk and jury commissioner to obtain such a panel amounts to systematic and intentional discrimination.

As the trial Judge stated [R. 2565]:

“Proportional representation is not possible, nor is it permitted or required under the law \* \* \* If proportional representation on a panel is not required, then disproportional representation is not invalid, unless it is the result of a systematic and intentional exclusion of persons or groups by the clerk or the commissioner, either directly or by the intentional devising of a system or method of selection, which is bound to result in such systematic exclusion.”

Having no evidence to prove intentional or systematic exclusion or discrimination, appellants contend that lack of proportional representation of certain classes on the jury panels shows that the clerk and commissioner must have had the intention to discriminate which is essential before lack of proportionate representation will be held to be improper.

The Supreme Court said in *Fay v. New York*, 332 U. S. 261, at 291:

“Even in the Negro cases, this Court has never undertaken to say that a want of proportionate representation of groups, which is not proved to be deliberate and intentional, is sufficient to violate the Constitution. *Akins v. Texas*, 325 U. S. 398. If the Court has hesitated to require proportional representation where but two groups need be considered and identification of each group is fairly clear, how much more imprudent would it be to require proportional representation of economic classes. \* \* \*”

Appellants rely heavily upon *Thiel v. Southern Pacific Company*, 328 U. S. 217. In that case, the clerk testified that in making his selections for jury service he did not include persons who worked for a daily wage. This was



direct evidence of deliberate and intentional discrimination against such persons. Evidence of this nature is completely lacking in the instant case.

On retrial of the *Thiel* case, the trial court accepted a panel which had been selected by the same standards as in this case. (67 Fed. Supp. 934.) Circuit Judge Healy, in his concurring opinion on appeal to this Court, 169 F. 2d 30, 32 (9 Cir.), commented:

“\* \* \* It is probably open to debate whether the practice squares in all respects with the views expressed by the Court in the opinion reversing the earlier judgment, *Thiel v. Southern Pacific Co.*, 328 U. S. 217. Cf. also *Ballard v. United States*, 329 U. S. 187. The trial judge thought it did. Obviously any method devised in an effort to obtain a fairly representative group of jurors will be open to criticism, for it is not possible even to approximate perfection along this line. Persons qualified and available for jury service do not readily yield to classification in a society so fluid as ours. They cannot be neatly pigeonholed like specimens of rock or mineral. Most people, on close inquiry, are found to be classifiable logically in more than one group, and it is only in the case of color, and perhaps creed, that strict lines can be drawn.

“Like my associates, I am content to rest decision of the point on the trial judge’s review of the evidence as to the procedure adopted. If a conscious effort is to be made to obtain a representative cross-section of the community on the basis of such information as is available in telephone books, city directories and the like, I suppose the method employed is as fair as any so long as no particular group as a whole is systematically excluded, and no claim of that kind can be

asserted here. It is doubtless true that the percentages used do not accurately reflect census figures, but a good faith effort appears to have been made to give substantial representation to both sexes and to all racial and economic groups. Cf. *Fay v. New York*, 332 U. S. 261."

There has been no showing of malfeasance or misfeasance by the clerk or jury commissioner, by way of intentional and systematic discrimination against or exclusion of any classes of jurors, such as would empower the court to declare their actions null and void or unlawful.

(c) APPELLANTS HAVE FAILED TO ESTABLISH PREJUDICE TO THEMSELVES.

Appellants have failed to establish any prejudice as a result of the method of selection of jury panels which would justify the Court in granting their motion.

In *Fay v. New York*, 332 U. S. 261, 291-293, the Supreme Court said:

"No significant different in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it. It would require large assumptions to say that one's present economic status, in a society as fluid as ours, determines his outlook in the trial of cases in general or of this one in particular. There is of course legitimate conflict of interest among economic groups, but they are so many and so overlie each other that not all can be significant. There is entrepreneur and wage-earner, consumer and producer, taxpayer and civil servant, foreman and laborer, white-collar worker and manual laborer. But we are not ready to assume that these differences of function degenerate into a hostility such that one

cannot expect justice at the hands of occupations and groups other than his own. Were this true, an extremely rich man could rarely have a fair trial, for his class is not often found sitting on juries.

“Nor is there any such persuasive reason for dealing with purposeful occupational or economic discriminations if they do exist as presumptive constitutional violations, as would be the case with regard to purposeful discriminations because of race or color. We do not need to find prejudice in these latter exclusions, but *cf. Strauder v. West Virginia*, 100 U. S. 303, 306-309, for Congress has forbidden them, and a tribunal set up in defiance of its command is an unlawful one whether we think it unfair or not. But as to other exclusions, we must find them such as to deny a fair trial before they can be labeled as unconstitutional.”

It was the burden of appellants, not only to establish that there had been an intentional and systematic discrimination against certain classes, but also that appellants were within one of the classes so discriminated against. Appellants' motion stated that they “fall within the classes of persons” which were excluded, but the evidence does not contain an iota of proof in this respect. Appellants have sought only by categorical, unverified pleading to meet this fundamental requirement of eligibility to challenge the jury upon the grounds set forth by them.

Appellants' motion sets forth certain classes which are alleged to have been discriminated against, to-wit: laborers, people working by the day or hour, members of labor unions, and Negroes.

At the conclusion of their testimony, appellants sought to amend the motion by including among these specified classes “operatives and kindred workers, domestic workers, service workers,” and “Americans of Mexican descent,” and to allege that “proprietors, managers and officials were systematically and intentionally favored” [R. 2497-2502]. They introduced no evidence to show that any appellant was a laborer, or a person working by the day or hour, or a Negro, or an operative or kindred worker, or a domestic worker, or a service worker, or an American of Mexican descent. At the time of the hearing and decision upon their motion, the trial court was without enlightenment concerning the economic classification of appellants or any of them, except as alleged in the Indictment. The Indictment alleged [R. 7] that:

“The fishermen who are members of Local 36, IFAWA are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit.”

The evidence subsequently introduced during the trial of this case shows that the following appellants were boat owners: F. R. Smith [R. 1471]; George Knowlton [R. 1577-82]; W. B. McComas [R. 1596]; Arthur D. Hill [R. 1705]; C. Lloyd Munson [R. 1694-5]; Robert M. Phelps [R. 1603]; Burt D. Lackyard [R. 1698]. Appellant Otis M. Sawyer owned a boat in 1945 [R. 1455].

The record shows that appellant Jeff Kibre was secretary-treasurer of the International Fishermen and Allied Workers [R. 1128]; Gilbert Zafran was secretary-treasurer of appellant Association [R. 1512-1515]; Harry A.

McKittrick was a business agent for appellant Association [R. 1748]; Charles McLauchlan was business manager for a union [R. 1611]. The Indictment identifies Clifford C. Kennison as an assistant business agent of a union [R. 5]; and Ray J. Morkowski as business agent of a union [R. 5], and no evidence was introduced controverting these statements.

Thus, according to the allegations of the Indictment and the evidence introduced at trial, all of appellants were either the owners of fishing boats or were employed in the capacity of managers or officials. Thus, they clearly fall in the Census classification of “proprietors, managers and officials”—the very classification which they charge was over-weighted in the jury panel.

This not only demonstrates the absurdity of adopting Census employment classifications as definitions of “economic classes,” but also shows clearly that appellants have established no valid basis for their contention that the grand jury and petit jury would be inherently biased or prejudiced against them.

This leaves but one ground for their objection to the constitution of the jury panels, that is, their contention that members of labor unions were excluded. The appellant Association is described in the Indictment as an unincorporated association affiliated with the Congress of Industrial Organizations, and the individual appellants are identified as officials or members of that Association. Assuming, *arguendo*, that the appellant Association is a labor union, and that the individual appellants are therefore members of a labor union, the appellants still have failed completely to show that there was any discrimination, intentional or otherwise, against members of labor

unions in the selection of the jury panels. Not only did the appellants fail to produce evidence to this effect, but their own witness, Robinson, testified [R. 2411-2417] that he had not attempted to make any analysis of the jury panels with respect to membership or non-membership in labor unions, and that he thought it likely that there would be members of labor unions in practically all of the classifications used by him. The witness said:

“I think you will find union groups scattered almost completely throughout every one of those specific occupations, and in fact rather than waste time I am quite willing to grant it.” [R. 2416.]

The Clerk testified [R. 2089] that he had never failed to make a card for any prospective juror whose questionnaire indicated that he was a laborer working by the day or that he was a member of a labor union, and that there were many such persons on his lists.

The appellants offered no evidence to show that they were not the owners of telephones or that their names did not appear in the telephone directories used by the clerk and jury commissioner. They failed to offer any evidence to the effect that they were not the owners of automobiles and that their names were not included in lists of registered automobile owners. They failed to offer evidence that they were not owners of taxable personal property and that their names were not on personal property tax rolls of the type used by the clerk and the jury commissioner. Their failure to offer proof of this nature, and, in fact, any proof whatsoever to show that they fall with-

in the class of persons whom they contend were discriminated against, leads to the presumption that they could not present such evidence.

Thus, appellants failed completely to show that they were members of any class which had been the subject of intentional and systematic discrimination in the selection of jurors, and they failed to show that there was any discrimination against any group or class of which they were members.

It is apparent from the entire Record that the appellants were businessmen engaged in the business of catching and selling fish for their own account and profit. Where their residences are identified in the Record, they are shown to be located in communities from which jurors were drawn. There is certainly no recognizable difference in the economic status of one who fishes on shares in a commercial enterprise and one who is the proprietor or operator of a small commercial enterprise located on shore. Appellants have totally failed to carry their burden of showing that any class or group of persons was intentionally and systematically excluded from the jury panel, and the burden of showing that they were members of any class or group which was discriminated against.

It may be that methods of selecting jurors can be devised to the end that there will be proportional representation of all strata of economic, occupational and religious groups, but to do so would require a much greater selec-

tivity than is now employed by the Census Bureau, and would call for a greatly augmented jury commissioner's staff.

The Court, in exercising such supervisory control over jury matters as is called for in the decision in the *Thiel* case should exercise that supervision with regard for the fact that there is no statutory provision for the payment of expenses involved in an elaborate jury impanelment machinery, and certainly the jury commissioner cannot be said to have been guilty of malfeasance or misfeasance in failure to provide such machinery on a budget of \$15.00 per year [R. 2142, 2171].

It is accordingly submitted that the panels from which the grand and petit juries were secured were properly selected, and appellants' motion to dismiss the Indictment on the contrary ground was properly overruled.

### Conclusion.

We submit that since the Indictment stated an offense under the laws of the United States; that since the verdict and findings are supported both by the law and the evidence; that since the instructions given by the trial Court were clearly correct; that since the trial Court did not err in refusing to give certain instructions offered by appellants, and committed no prejudicial error in excluding certain evidence offered at the trial by appellants; that since the trial Court properly granted the motion to quash the subpoenas *duces tecum*, and was correct in admitting summaries of items contained in books of account; and



since the panels from which the grand and petit juries were drawn were selected properly, the judgments of conviction entered upon the jury's verdicts of guilty should be affirmed.

Respectfully submitted,

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND  
ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT  
ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH,  
GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MC-  
COMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL,  
C. LLOYD MUNSON, CHARLES McLAUCHLAN, ROBERT  
M. PHELPS, BURT D. LACKYARD, and RAY J. MOR-  
KOWSKI,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANTS' REPLY BRIEF.**

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No. 11,638

IN THE

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## APPELLANTS' REPLY BRIEF.

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It will be recalled that the sole objective of these appellants was to be guaranteed that the market price of fish would not drop while they were out to sea. They were not seeking a "closed shop" and the price agreed upon could be renegotiated at any time before they set out on another voyage, a so-called "trip by trip" basis (App. F, p. 13, Appellants' Op. Br.).

The appellants contended then. and do now, that such an objective was lawful. The fish buyers' only objection was that it might be declared unlawful. It remains for the Court to finally resolve this issue.

## POINT ONE.

**The Government's Case Was Based Upon Misconceptions of Fact and Law, Some of Which Have Now Been Conceded in the Government's Reply Brief.**

**A. Appellants Were Not in a Vertical Combination of Owners and Workers.**

It is now apparent even to the Government that this indictment was based on a serious misconception of the facts.

Paragraph 5 of the indictment alleged that the term "fishermen" meant boat-owners and in the Government's opening statement, it was declared that the appellant association was composed "principally" of boat owners [Tr. 127].

Since the Anti-trust Division had been rebuffed just four years previously by the United States District Court for Oregon in an effort to prosecute another local of the appellant international fishermen's union, a new theory was necessary. The mistaken belief that this local was composed principally of boat owners furnished this new basis for renewed prosecution.

The charge of boat ownership here was similar to the plaintiff's allegations in the complaint filed in *Hawaiian Tuna Packers, Ltd. v. Int. L. & W. Union*, 72 Fed. Supp. 562 (July 15, 1947), in which the Court said at page 567:

"But it is said by defendants that these boatowners to which plaintiff has reference are also fishermen. That is some of the 'some boatowners' are owners who fish as members of the crew, receive shares of the proceeds as crewmen, as well as retain the owner's share. That may be, and it may upon trial develop that they are in Local 150 as crewmen or fishermen



rather than in their capacity as boatowners. But at the moment all that is known is what is alleged, namely that union crew members have combined with some of their employers to effect their purpose. Such an allegation as against the motion must be taken as true and it brings the case within the Allen Bradley decision."

In this case, the precise facts DID develop at the trial. Instead of a union of boat owners as charged in the indictment, the government's contention has now dwindled to saying that "many of the fishermen members of the association, as well as many non-member fishermen, owned and operated their own boats" (Govt. Rep. Br. p. 7). Government's Exhibit 13 showed that the union admitted working fishermen only to membership and appellants' testimony to this effect was never controverted (Appellants' Op. Br. p. 7).

Thus the appellants' combination was a *horizontal* one, composed of men in the same phase of production.

In the *Hawaiian* case (*supra*), the Court granted a preliminary injunction upon the naked allegations of the complaint that the combination there was a *vertical* one of boat owners and worker-employees. The Court assumed that if the combination was vertical and that if a labor union was involved, then *Allen Bradley v. Local Union No. 3*, 325 U. S. 797 applied, or if a cooperative was involved, then *U. S. v. Borden Co.*, 308 U. S. 188 applied.

Appellants concede the force of these two cases. But they are both directed at *vertical* combinations. If either a labor or farmer group joins with employers, middlemen, or others, they have lost the exclusive characteristic which entitle them to exemption from the Sherman Act. But that is not the situation in the case at bar.

## B. Appellants' Simple Bargaining Methods Are Legal.

At pages 35 and 53 of its reply brief, the Government apparently contends that the Clayton Act did not give farmers any rights to organize horizontally and market their products collectively. The Government's position here is that the Capper-Volstead Act of 1922 and the Fishermen's Marketing Act of 1934 were necessary to permit this.

The facts and law are exactly to the contrary. The Clayton Act permitted only *horizontal* combination at the production level. The later acts were passed to permit farmers and fishermen, acting through combinations limited to original producers, if they desired, to ascend *vertically* higher into the distributive process. That is, producers were allowed to combine, and in such combination, to engage in the distributive process.

The true reasons for the later acts are stated in Professor John Hanna's recent article on "Anti-trust Immunities of Cooperative Associations," 13 Law and Contemporary Problems (Duke Univ., Summer 1948) page 488 at 498:

"Since the Clayton Act is not specific as to what are agricultural or horticultural associations, and since its immunity does not extend to cooperatives having capital shares, although a true cooperative may have capital shares and many of the older cooperatives were so organized, the Capper-Volstead Act was passed in 1922 to clarify the cooperative exemptions. Cooperatives may be corporate or other forms of association with or without share capital. Producers include farmers, planters, ranchmen, dairy-men, and nut and fruit growers. Associations may engage in processing, preparing for market, and

handling and marketing products of members in interstate and foreign commerce. They may have marketing agencies in common. Several requirements are enumerated, including the one-man-one-vote principle, limitation of dividends on share capital to 8 per cent, and no dealing in products of non-members to an amount greater in value than for members.” (Emphasis supplied.)

However, here the appellants never chose to ascend the vertical ladder even though they could have done so within the limitations of the Fishermen’s Marketing Act.

Paradoxically, at the trial the Government argued that appellants were not a cooperative unless they did more than merely bargain for future prices of fish to be caught by their members.

For example, when appellants’ proposed instruction No. S-12 [Tr. 59] was being argued, Mr. Rubin, one of the Government’s attorneys, said [Tr. 1859]:

“They are going to argue that this is just a marketing agency *and we are going to have to say that they must do more than fix the price at which their members will individually sell to the dealers.* That will be the argument made before the jury.” (Emphasis supplied.)

This was followed by this statement [Tr. 1860] by Mr. Dixon, counsel for appellee herein:

*“We feel that if they don’t sell anything, or act as a sales agent for any of their members in selling anything, that they are not a cooperative.”* (Emphasis supplied.)

However, in at least one section of the Government’s Brief, this absurd position has now been abandoned by the

Government, and appellants gratefully acknowledge the following concession:

“It is not disputed by the Government that an association properly organized and functioning under the Fishermen’s Marketing Act may enter into contracts with individual dealers which provide for the price at which the products of the association or its members may be sold.” (Govt. Rep. Br. 37.)

In other words (although the reply brief is far from clear in this point), it is now apparently all right with the Government if the appellants merely operate *horizontally* as a simple bargaining agent.

**C. Appellants’ Objective Was Limited to an “Open Shop” Contract and Was Therefore Legal.**

It is the Government’s contention that the instructions given by the Court with respect to the Fishermen’s Marketing Act are supported by *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143. Completely overlooked is the fact that that case does not deal at all with collective bargaining concerning prices. In that very case it is pointed out that the union was acting as the collective bargaining agent for the sale of fish caught by its members, and this activity is not condemned, directly or indirectly. Rather, it is the exclusion of fishermen from the market and only this that is dealt with by the Court. So, too, it was the closed shop provision of the agreement and only that which the trial court considered illegal. The trial court in that case pointed out that the power to combine *for other purposes* gave the defendants ample protection.

“Having organized the fishermen ninety per cent, the defendant union has a great power in its hands. Such control, approaching a complete monopoly in

the production of one of life's necessities, calls for reasonableness and moderation in the exercise of the power. I am certain that with so complete an organization, the fishermen will find that the powers granted by the Federal cooperative statutes are ample to protect their markets." (34 Fed. Supp. 970, 977.)

Of course, that decision is expressly not applicable to the case at bar. Here the appellants had expressly relied upon a later decision by the same Court in which Judge McCullough had approved an "open shop" combination. There the Court dismissed the Government's indictment declaring that the practice of group bargaining in the fishing industry was a "satisfactory" one. (*United States v. Columbia River Fishermen's Protective Assn.*, No. C-16087 (1943), Appellants' Op. Br. 43.)

The contracts sought to be obtained in this case were thus of an "open shop" character and no contention to the contrary is made by the Government, although an instruction to this effect, S-18, was refused by the Court as not having "any place in the case" and "immaterial" [Tr. 1827].

#### D. The Sherman Act Is Not Concerned With the Means Employed by the Appellants.

The issue in this case is thus narrowed to what the Government calls "the real question" (Govt. Rep. Br. p. 36), to-wit: Does a *horizontal* combination of food producers violate the Sherman Act if it employs coercive methods in order to get a minimum price contract?

The proposition stated in the court's instructions and supported by the Government that a fishermen's association may enter into a price-fixing contract but that it may

not “force” such a contract “on non-assenting dealers by coercive methods and tactics” (Govt. Br. p. 39) is untenable. What is meant by “coercive methods and tactics”? Is the withholding of a product by a combination a coercive method and tactic? In every transaction parties use their economic power to obtain the best possible terms. A trade union uses such power when it strikes. That does not render the agreement in settlement of the strike illegal under the anti-trust laws, even if there were unlawful acts of “coercion” in the course of the strike, which acts of coercion actually interfered with the free flow of goods in interstate commerce. The reason for this rule is that so long as the objective of the trade union is a valid one, the methods used whether legal or illegal are not limited by the Sherman Act.

In *United States v. Bay Area Painters and Decorators Joint Committee, Inc., et al.*, 49 Fed. Supp. 733 (1943), the Court said:

“The unions must necessarily negotiate and bargain collectively with the employers. It would seem beyond belief that Congress intended to protect the machinery used by labor to enable it to negotiate and bargain collectively for terms and conditions of employment and then, after it completes its negotiations and has made its bargain through agreement with the employers, to withdraw that protection and leave the parties to the agreement liable for prosecution for criminal conspiracy. Such a construction would vitiate the effect of the Clayton and Norris-La Guardia Acts, for such agreements almost always have some effect on interstate commerce, if only to raise prices by increase in wages or decrease in hours of work.”

Coercive methods are not a violation of the anti-trust laws. Even if an agreement were obtained at the point of a gun, its validity *under the anti-trust laws* would depend solely upon the terms of agreement finally reached and whether such terms illegally restrained commerce. And if the agreement did illegally restrain commerce, the violation of the anti-trust laws would be no less if all the parties to the agreement had entered into it without the slightest semblance of pressure from anyone. The error in the court's instructions and the rulings on the admissibility of evidence with respect to picketing and other activities arose out of a failure to recognize these principles.

The Government concedes that a horizontal combination of employees in a labor union may legally employ such coercive tactics.

“Picketing and boycotting activities by labor union members would probably be legal if pursued in connection with the carrying out of a legitimate labor union objective.” (Govt. Rep. Br. p. 48.)

This was not always the law. The Danburry hatters lost their homes and their livelihoods in 1907 after the decision in *Lawlor v. Loewe*, 234 U. S. 522. The decisions in 1921 of *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, and in 1927 of *Bedford Cut Stone Co. v. Journeyman Stonecutters*, 274 U. S. 37, directly brought about the Norris-LaGuardia Act of 1932.

The significance of the Supreme Court's subsequent decisions in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, and *United States v. Hutcheson*, 312 U. S. 219, seems to have completely escaped Government counsel in this case.

In this case the Government continues to cite as authority the *Duplex* and *Bedford Cut Stone* cases just as if

Mr. Justice Frankfurter had never said of them in *United States v. Hutcheson* (*supra*):

“There is no profit in discussing those cases under the Clayton Act which were decided before the Courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict.” (P. 236.)

The point that the Government misses is that the Supreme Court’s new interpretation of the Sherman Act since 1939 is that it is not designed to police any kind of tactics, even violence, such acts being held to be the concern of State law alone. The Supreme Court has directed a Federal “hands off” policy on *tactics*, no matter what *kind* of a group or individual engages in them.

The case of *Swift & Co. v. United States*, 196 U. S. 375, 396, relied upon by the Government actually supports the appellants. In that case, it was held that even though each individual act in a conspiracy is lawful, “the plan may make the parts unlawful.” Here, whether the picketing and other activities engaged in by the defendants were in violation of the anti-trust act depends upon the “plan” which the said activities were calculated to promote. If the plan, that is, achieving a price-fixing contract or working out an arrangement whereby the individual fisherman could determine the price of his catch in advance of the fishing trip violated the anti-trust laws, then picketing and other activities utilized to forward the plan were unlawful. If the attainment of the objectives sought was legal, then the picketing and other activities were not in violation of



the anti-trust laws, whether or not such activities were otherwise unlawful.

The Supreme Court's present day position is that the Sherman Act is only concerned with illegal *ends*. If the ends are legal, no Federal power exists to prevent their attainment by illegal *means*, even though those acts are punishable by State law. (See Appellants' Op. Br. pp. 124-127.)

Therefore, the Government is no longer able successfully to contend under present day decisions that the *means* employed by the appellants were a violation of the Sherman Act. What Government counsel is trying to do, unwittingly, we trust, is to get the assistance of this Court in turning back the clock and to return the Federal judiciary to the business of policing coercive tactics *per se*.

Throughout its brief, the Government argues that there is a difference between the rights of a labor union and an association of producers under the Clayton Act. Just *what* the nature of that alleged difference is and *why* it exists is left a mystery. The Sherman Act and the other statutes dealing with the subject of monopolies and restraint of trade were not designed to establish technical procedural distinctions between and among organizations and their activities. These laws were enacted to deal with basic economic problems. Organizations composed of certain economic groups were evil, in the belief of Congress, if they tended to become monopolistic or to fix prices. On the other hand combinations which strengthened bargain-

ing power and set prices for original producers or established wages were believed to be in the public interest. No argument based on some technicality should be allowed to conceal these fundamental facts. That is why Judge McCullough, the trial judge who was sustained by the Supreme Court in the *Hinton* case, *supra*, ruled that a fishermen's group organized as a labor union was entitled to the protection of the Fishermen's Marketing Act. (*Columbia River Packers Assn. v. Hinton*, 34 Fed. Supp. 970, *supra*, and *United States v. Columbia River Fishermen's Cooperative Assn., Inc.* (see Opening Brief, pp. 43-48).)

Summarizing, appellants say:

1. This is not an illegal *vertical* combination prohibited by the *Allen Bradley* and *Borden* case.
2. The simple bargaining practices of the *horizontally* combined appellants are legal.
3. The end sought was not the closed shop declared illegal in the *Hinton* case.
4. The tactics employed by appellants to gain these legal ends are not a matter of Federal concern under the Sherman Act.

Nothing other than the above need be decided in this case.

## POINT TWO.

**Appellants' Defenses Need Not Be Considered in View of the Government's Failure to Present an Affirmative Case. Nevertheless, These Defenses Would Constitute an Absolute Bar to This Prosecution.**

**A. The Exemptions of the Clayton Act Apply to Appellants and That Act Makes No Distinctions Between Laborers and Farmers.**

This Court need not concern itself with the perplexities raised by the Government in harmonizing the labor and farmer exemptions found in Section 6 of the Clayton Act. Such bothersome distinctions did not trouble the original legislative draftsman. (See Senate Report quoted at Appellants' Op. Br. 60.)

At page A 1636, Congressional Record, 80th Cong., April 8, 1947, there is to be found the following language from a speech by William M. Leiserson, of John Hopkins:

"But not only labor unions, farmers' organizations, too, are exempted from anti-trust laws. Unquestionably, unions are combinations to restrict competition among workers, to raise and standardize wages and working conditions through whole industries; and farmers organize to standardize products and raise prices. In fact the Government lends money to combinations of farmers to help them withhold their products until they can get the prices they want. These Government policies with respect to labor and agriculture were established by law to deal with economic and social evils brought on by competition among farmers and workers, just as the anti-trust laws were directed against the evils of business monopolies. To say they are special licenses to violate the law and to compel wage earners (or farmers) to compete and

underbid each other is to ignore history and the progress that has been made since the combination laws of Adam Smith's days."

The two groups were also lumped together by Mr. Justice Frankfurter in *Tigner v. Texas*, 310 U. S. 141, when he said:

"Those who labored with their hands and those who worked the soil were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations." (P. 145.)

**B. The Exemptions of the Clayton Act Differ From the Norris-La Guardia Act in That an Employer-Employee Relationship Is Not a Necessary Ingredient.**

The employee-independent contractor problem also need not vex the Court in this case because no injunctive relief is sought and the Norris-La Guardia Act is not involved except as Justice Frankfurter used it as a Congressional construction of the Clayton Act in *United States v. Hutcheson*, 312 U. S. 219, 236. Should, however, the Court address itself to this problem, appellants think it imperative that the Court examine a recent brilliant article in which the fisherman's economic status is extensively discussed, "Restraint of Trade—Employees or Enterprises," 15 Chicago Law Rev. 638 (Spring 1948).

The case of *Hopkins v. United States*, 171 U. S. 57, relied upon by appellants is cavalierly thrust aside on the ground that it involves the sale of services—the very ground for which it was cited in the Opening Brief. In that case, decided even before the Clayton Act exemption was enacted, the Court looked through the surface technical relationships of independent businessmen, or "commission merchants," as they were referred to in the opinion,

and held that in reality services were being sold and that services were not covered by the Sherman Act. We are asking this Court in an even clearer situation to follow the same principle.

The Government cites *American Medical Assn. v. United States*, 317 U. S. 519, as laying down a different rule. That case involved a health insurance business and a conspiracy to prevent it from doing business. There was no question of the right to set prices for medical services; rather the problem was one of excluding the association from the market place, incidentally the same problem as was involved in *Columbia River Packers Assn. v. Hinton*, 315 U. S. 143, and *Manaka v. Monterey Sardine Industries*, 41 Fed. Supp. 53, relied upon by the Government.

Most important is the fact that the Clayton Act is not limited to situations where an employer-employee relationship exists or where the transaction involves services only; it includes original producers as well as workers for wages.

**C. Appellants Were Economically Justified so Long as They Were Not Fixing Consumer Prices.**

Although the Government makes the curious objection to expert testimony that it is the "conclusions of the witness" (Govt. Rep. Br. p. 62), appellants nevertheless commend to the Court's attention Exhibit (for identification) TT. This is the proffered testimony of Dr. John B. Schneider (summarized at pp. 28-33, Appellants' Op. Br.) who, since the trial, has become manager of the California Prune Marketing Program.

Economic justification is not necessary to be shown where there is an express statutory exemption under the Clayton Act, but this and similarly proffered testimony

(App. G, p. 16, Appellants' Op. Br.) will be useful in furnishing this Court a complete picture of the economic situation existing today in the fresh fish industry.

The rule in the case of *United States v. Socony-Vacuum*, 310 U. S. 150, making consumer-market price fixing illegal *per se*, marks an important advance in the public's protection and appellants are as much in favor of it as the Government. It simply is not involved in this case; first, because the Clayton Act and the Fishermen's Marketing Act permit the appellants to fix their prices, and second, even if the exemption was not applicable, the prices fixed by appellants do not affect prices to the consumer but only the middleman's margin of profit. (See *Appalachian Coal v. United States*, 288 U. S. 344 (Appellants' Op. Br. pp. 97-109) and Dr. Schneider's testimony (Appellants' Op. Br. p. 32).)

The Government seeks to distinguish the *Appalachian Coal* case from the *Socony-Vacuum* case on the basis that the latter is a price-fixing case and the former is not. In a basic sense, which the Government has failed to recognize, this distinction is sound. In the former case there was no price fixing directly affecting consumer prices; in the latter there was such price fixing. It is this that rendered one illegal and the other not. In both cases, however, there was fixing of prices at intermediate levels.

In the *Socony-Vacuum* case, prices were fixed through the means of buying up gasoline so as to artificially raise the price to the consumer.

"As a result of these buying programs it was hoped and intended that both the tank car and the retail markets would improve. The conclusion is irresistible that defendants' purpose was not merely to raise the spot market prices but, as the real and ultimate end,

to raise the price of gasoline in their sales to jobbers and consumers in the Mid-Western area.” (310 U. S. 150, 190.)

Whereas in the *Socony-Vacuum* case, prices were fixed indirectly through a buying program, in the *Appalachian Coal* case the combination acted directly as a sales agency and, as the court said, “prices are to be fixed by the officers of the company at its central office.” The fact is that in the *Appalachian Coal* case price fixing is involved, but, to use the language of the cited case, there was no “power to dominate or fix the price of coal in the consuming market.” That power existed in the *Socony-Vacuum* case and, therefore, the *per se* rule applied. It is on this very basis that the Court in the latter case distinguished the *Appalachian Coal* case, 310 U. S. 215, 216.

Finally, in *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, the Court noted that when the Sherman Act was adopted there were two views as to its purpose, one being that the Act was aimed at “high consumer prices achieved through combinations looking to control of markets by powerful groups.” The second view was that the Act applied to all combinations which interrupted the free flow of trade or tended to create monopolies. Initially the latter view was accepted. However, this met with vigorous opposition, leading to the adoption of the Clayton Act and the Norris-LaGuardia Act, until finally the Court in the *Allen Bradley* case said:

“We said in *Apex Hosiery Co. v. Leader, supra*, 448, that labor unions are still subject to the Sherman Act to ‘some extent not defined.’ The opinion in that case, however, went on to explain that the Sherman Act ‘was enacted in the era of “trusts” and of “combinations” of businesses and of capital organized and directed to control of the market by suppression of

competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern'; that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade. This was a recognition of the fact that Congress had accepted the arguments made continuously since 1890 by groups opposing application of the Sherman Act to unions. It was an interpretation commanded by a fair consideration of the full history of Anti-trust and labor legislation." (325 U. S. 806.)

**D. The Jury Questions Should Also Be Resolved in Appellants' Favor.**

In the interests of an improved administration of justice in District Courts of the United States this appeal should not only be resolved in favor of the appellants on the merits but also upon the jury questions argued in Appellants' Opening Brief, pages 148-195.

Much that is contained in the Government's Reply Brief (pp. 71-89) on this point consists of the erection and destruction of straw men. In the present case, a method of selection of proposed jurors was purposefully and intentionally used. The only issue is whether that method of selection was proper.

The Government, relying on the case of *Fay v. New York*, 332 U. S. 261, goes to great lengths to prove that the appellants were not injured by the method of jury selection. This argument entirely overlooks the fact that in a Federal case, prejudice is immaterial. *Thiel v. So. Pacific Ry. Co.*, 328 U. S. 217, 225, and *Ballard v. United States*, 329 U. S. 186. Furthermore, appellants were organized into a CIO union and engaged in strike activities.



Can it be doubted that the attitude of those in the lower economic classifications is generally more favorable to such groups and activities than is the attitude of those in higher economic classifications?

The case of *Thiel v. So. Pacific Ry. Co.*, 169 F. 2d 30, 32, is relied upon by the Government as establishing that a system of selection such as was used in the instant case is a proper one. There, it appears that the sources used were "telephone books, city directories and the like." That is a far cry from the situation here. Between 1943 and 1947, a typical period for which there was complete information as to the sources used for the selection of jurors, over 25% of the names selected came from social registers and country and social clubs. This is only one striking example of a deliberate system of selective selection which differentiates this case from any relied upon by the Government.

The Government's heavy dependence on the *Fay* case, *supra*, indicates the weakness rather than the strength of its position. That case is one in which a violation of the Fourteenth Amendment had to be established—the appeal being from a decision of a State Court. Here, the Court is asked to exercise its "power of supervision over the administration of justice in the Federal courts." Here, a reversal is required if the approval of the system used "would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged." (*Thiel v. So. Pacific Ry. Co.*, 328 U. S. 217, 224-225.) The system here used did give a special place to the "economically and socially privileged." For that reason, as well as the others cited in the appellants' opening brief, the method of jury selection here utilized should stand condemned.

### Conclusion.

On the decision in this case hinges the economic future of an important Pacific Coast industry. Only the guidance of this Court can restore stability and certainly to an industry which, properly encouraged, can furnish employment to thousands and food for millions of people.

Unless this clear guidance is given, the fresh fish industry will remain an archaic one. (Testimony at the trial revealed that while the national annual consumption of fish is 14 pounds per person, the average in Southern California is only 7 pounds, despite the fact that the world's greatest marine resources are at our doors [Tr. 1314].

The fresh fishing industry's chance to become aggressive and streamlined, to grow and bring added prosperity to the West, like the organized citrus, walnut and dairy industries, is now strangled by indecision. No one dares to move. The appellants did dare to move and for their pains are now branded as criminals.

The Government has assumed a serious responsibility to the economy of the Pacific Coast in attempting to slam the door on the joint activities of these appellants. It will be the duty of this Court to point the way out and, in the light of the appellants' experiences, only the most intrepid will follow the path unless the most explicit guidance is given.

Respectfully submitted,

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No. 11,638

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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LOCAL 36 OF THE INTERNATIONAL FISHERMEN AND AL-  
LIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT  
ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE  
KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS,  
HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD  
MUNSON, CHARLES McLAUGHLIN, ROBERT M.  
PHELPS, BURT D. LACKYARD and RAY J. MORKOWSKI,  
*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## PETITION FOR REHEARING.

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GLADSTEIN, ANDERSEN, RESNER AND  
SAWYER,

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*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## PETITION FOR REHEARING.

---

*To Chief Judge William Denman and the Associate Judges  
of the Court of Appeals for the Ninth Circuit:*

The appellants herein respectfully petition this Honorable Court to grant a rehearing of its decision filed herein on September 28, 1949, upon the following grounds:

I.

**Preliminary Statement.**

This petition will be limited to what appellants perceive to be the fundamental problems presented by the Court's opinion herein and their claims of error with respect thereto. By such limitation appellants do not waive or abandon any of the points presented in the appeal.

The length of this petition is explained by the fact that the opinion passes upon a matter which was not raised in the court below and which was not in any way presented by the parties on the appeal herein. In its opinion the Court severely censured counsel for appellants in a situation in which it is submitted there was no basis even for the slightest criticism of their conduct. Counsel have never heretofore been called upon or had an opportunity to discuss this matter.

II.

**Coercive Tactics, Even by Non-members of Labor Unions, Are Not Covered by the Sherman Law. The Ends, Not the Means, Are the Sole Concern of the Federal Courts.**

This Court has stated in its opinion (p. 9) that the written agreement which appellants required the dealers to sign was "innocuous upon its face." By its terms, no dealer was forbidden to deal with non-member fishermen,<sup>1</sup> and the latter were not excluded from the market in any way.<sup>2</sup>

However, this Court relies upon a distinction that appellants employed coercive tactics in compelling the dealers to sign this otherwise innocuous document. For the purposes of this petition it will be assumed *arguendo* that the appellants forcibly restrained non-member fishermen from going to sea until they agreed to withhold fish from non-cooperative dealers, and that similar restraints were applied to the customers, suppliers and carriers of the non-cooperative dealers. In other words, it will be assumed that the appellants excluded persons from the market for the purpose of getting a contract that would not exclude such persons.

Appellants again urge here as they did at the trial that these tactics, if true, may have been punishable by state law but that they do not constitute violations of the Federal Anti-Trust Laws. It is only the agreement itself,

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<sup>1</sup>This would have constituted a so-called "closed shop" provision of the kind held illegal in the *Hinton* case (34 Fed. Supp. 970), and the *Manaka* case (41 Fed. Supp. 53).

<sup>2</sup>Thus the written contract was of the "open shop" type allowed by the Court in *U. S. v. Columbia River Fishermen's Protective Assn.*, No. C-16087, D. C. District of Oregon (unreported). See page 13 of this Court's decision.

the final objective, that can support a conviction under the Sherman Act.

The opinion of this Court recognizes that coercive tactics are no longer regarded as restraints upon interstate commerce if engaged in by members of a labor union acting in pursuit of legitimate objectives (p. 15).

What this Court has failed to recognize is that the reason for the non-punishment of labor unions for such activities is not because they are specially exempted as unions by the Clayton or Norris-LaGuardia Acts, but because such acts are not in violation of the Sherman Act, no matter by whom committed.

It is true that this position was not always the rule applied by the Supreme Court. For decades labor unions argued in vain that they were specially exempted from the operations of the Sherman Act.

But the Act was consistently applied to unions almost immediately after the original passage of the law in 1890 (*U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994 and *U. S. v. Debs*, 64 Fed. 724); again in 1907 when they lost their homes and savings through the decision in the *Danbury Hatters* case (*Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488), and again in 1921 and 1926 when the fruits of their legislative victory through passage of the Clayton Act in 1914 were taken away in *Duplex v. Deering*, 254 U. S. 443, 65 L. Ed. 349 and *Bedford Cut Stone Co. v. Journeymen Stone Cutters*, 274 U. S. 37, 74 L. Ed. 916, over the dissents of Justices Holmes and Brandeis.

In fact, labor's great court victory only came in 1940 when Chief Justice Stone in the case of *Apex v. Leader*, 310 U. S. 469, 84 L. Ed. 1311 expressly disregarded labor's arguments that the Sherman Act did not apply to it, and then proceeded to point out for the first time the

obvious truth that had previously escaped all of the earlier litigants, to-wit: that coercive activities are matters for State courts, not the Federal. He did not place the grounds for this distinction upon the fact that those engaged in such activities were members of a labor union. Rather, he held that the decision was applicable to industry and labor alike:

“ . . . *an impartial application of the Sherman Act to the activities of industry and labor alike* would seem to require that the Act be held inapplicable to the activities of respondents which had an even less substantial effect on the competitive conditions in the industry than the combination of producers upheld in the *Appalachian Coals Case* and in others on which it relied.” (Emphasis added.) (310 U. S. 512-513, 84 L. Ed. 1334.)

The impact of the *Apex* decision upon the subsequent judicial treatment of the Sherman Act is best illustrated by what was said of this decision in the dissenting opinion of Mr. Chief Justice Hughes:

“Whatever vistas of new uncertainties in the application of the Sherman Act the present decision may open, it seems to be definitely determined that a conspiracy of workers, *or for that matter of others*, to obstruct or prevent the shipment or delivery of goods in interstate commerce to fill the orders of the customers of a manufacturer or dealer is not a violation of the Sherman Act.” (Emphasis supplied.) 310 U. S. 469, pp. 514-515, 84 L. Ed. 1335.

Petitioners respectfully submit therefore that this Court misconstrued the existing law when it stated in its opinion at page 20 that:

“It is *only* that, in pursuit of a legitimate object of a laboring union, picketing and boycotting are not illegal.” (Emphasis supplied.)

III.

**The Sherman Act Is Only Concerned With Restraints of Commercial Competition Which Affect the Public Through Consumer Prices.**

This Court stated the principle contended for by appellants at page 25 of its opinion as follows:

“It is true likewise that the public interest is involved and the ultimate aim is to protect the purchasers and users of the product.”

Appellants respectfully submit that in consistency with this principle this Court should have disapproved instead of approving at page 17 of the opinion the exclusion of appellants' offered testimony to the effect “that the price paid to fishermen bears no relation to the amount charged by fish dealers to consumers.”

This testimony was the heart of appellants' defense. It is not necessarily based on the rule of reason but upon the new concept of the scope of the Sherman Law contributed to the law by the *Apex* decision.

In *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797, 801, 89 L. Ed. 1939, 1943-4, the Court noted that when the Sherman Act was adopted there were two views as to its purpose. The first was that the Act was aimed at “high consumer prices achieved through combinations looking to control of markets by powerful groups.” The second view was that the Act applied to all combinations which interrupted the free flow of trade or tended to create monopolies. Initially the second view was accepted. This position of the Court met with vigorous opposition, leading to the adoption of the Clayton Act and the Norris-LaGuardia Acts. Then, citing the *Apex* case, the Court said:

“The opinion in that case, however, went on to explain that the Sherman Act ‘was enacted in the era of “trusts” and of “combinations” of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern’; *that its purpose was to protect consumers from monopoly prices, and not to serve as a comprehensive code to regulate and police all kinds and types of interruptions and obstructions to the flow of trade.*” (325 U. S. 806, 89 L. Ed. 1946.) (Emphasis supplied.)

In *U. S. v. Universal Milk Bottle Service, Inc.*, 18 Law Week 2033, cited by this Court in its opinion (p. 19) it was pointed out that the effect on prices to consumers was the distinguishing allegation which made the indictment valid. The Court there said that the order under the Agricultural Act, relied upon by the defendants, only affected prices paid to producers and that there was nothing in the order or the Act itself which authorized or granted immunity for a conspiracy to fix prices of milk sold at retail or wholesale. The Court took pains to point out that it was this feature which distinguished the case from *U. S. v. French Bauer*, 48 Fed. Supp. 260, where an indictment was dismissed because it did not allege any effect upon consumer prices.

The Court of Appeals for the 8th Circuit, in *International Ladies Garment Workers v. Donnelly*, 147 F. 2d 246, 250, said, citing the *Apex* case:

“Since there was no proof to show that the enjoined activities of the defendants, either in purpose or effect, tended to control the interstate market to the detriment of consumers, they were not proscribed by the Sherman Act.”

IV.

Where a Price Fixing Agreement Does Not Violate the Sherman Act, a Combination to Obtain Such a Contract Does Not Violate the Law Even Though the Means Used to Achieve the Objective Consist of Strike Activities Which Interfere With Commerce.

In the *Apex* case the Supreme Court stated the issue as follows:

“This Court has never applied the Act to laborers or to others\* as a means of policing interstate transportation, and so the question to which we must address ourselves is whether a conspiracy of strikers in a labor dispute to stop the operation of the employer’s factory in order to enforce their demands against the employer is the kind of restraint of trade or commerce at which the Act is aimed, even though a natural and probably consequence of their acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer.” (310 U. S. 487, 84 L. Ed. 1319.) (Footnote added.)

Here the issue is whether fishermen striking to obtain a contract not illegal under the Sherman Act (as the Court in its opinion assumes) who stop the operation of dealers’ places of business in order to enforce their demand for such a contract, impose “*the kind of restraint of trade or commerce at which the Act is aimed*” even though there is a substantial interference with interstate commerce. It

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\*Note that while the facts in the cited case involve “*strikers in a labor dispute*,” the principles stated apply not only to such strikers, but to “*laborers or others*.”



seems obvious that the restraint in this case is the same “kind” as that in the cited case. Here the object of appellants was to obtain a legal contract. In order to obtain it, they engaged in conduct which it is claimed had the effect of interfering with the free flow of commerce. The parallel with the *Aper* case is clear:

“Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner’s product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers’ tortious acts, was the prevention of the removal of petitioner’s product for interstate shipment.” (310 U. S. 501, 84 L. Ed. 1327.)

If the purpose or effect of the combination was not to fix prices at the level of production, which the law permits, but was to fix them at the consumer level,\* the problem would have been different. Then the combination might have been considered as directed toward an end illegal under the Sherman Act rather than one permitted by that law and the exemption therefrom under the Fishmens Marketing Act.

Here, assuming as the court does that the contract sought was itself valid, it follows that all of the fishermen in the area could have combined for the purpose of securing this agreement. If they had a right to do so, then they all could have voluntarily withheld their products un-

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\*No evidence of such intent or effect was adduced. Petitioners’ offer to prove the contrary was rejected.

til the agreement was reached—for if there was a right to secure the agreement, there was a right not to catch or sell fish except upon its consummation.

Undoubtedly such a withholding would have affected the flow of fish from the producer to the market. Such effect, however, would have been no more illegal than that caused by any producer who withholds his product from the market until he obtains the price he seeks.

Nor is it any answer to say here that a withholding by a combination is different from that of an individual producer. If a combination for marketing purposes is permissible, that combination must have the same power as the individual to withhold its products from the market until it secures an acceptable price. Otherwise, the combination is meaningless and ineffectual because it has no increased bargaining power as a result of the combination. The association of fishermen must have the same power to bargain for price as does the individual.

If such a combination might voluntarily withhold its products from the market, the only conceivable complaint here is the claim that the withholding was achieved by force or other improper means. But the anti-trust law is not concerned with these matters. It deals with the legality of the combination—not with the propriety of the means by which the combination is effectuated.

“. . . The legislative history of the Sherman Act as well as the decisions of this Court interpreting it, show that it was not aimed at policing interstate trans-

portation or movement of goods and property.” *Apex Hosiery Co. v. Leader, supra*, at 310 U. S. 490, 84 L. Ed. 1321.

“. . . The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. It draws no distinction between the restraints effected by violence and those achieved by peaceful but oftentimes quite as effective means. Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence.” *Apex Hosiery Co. v. Leader, supra*, at 310 U. S. 513, 84 L. Ed. 1334.

This lack of concern is not limited to labor unions. The Act does not deal with such “policing” regardless of the character of the organization involved. If voluntary co-operation to achieve a given result be not illegal under the Sherman Act, then attainment thereof by any other means does not run afoul that law.

What this Court has done in its opinion is to apply cases in which price fixing is illegal under the Sherman Act to a situation in which it is permitted. (At least the Court assumes such legality.) If in this case the legality of price fixing under the Sherman Act be conceded, the essential corner stone of the claimed violation is eliminated and the case against appellants must fall.

Restraints on competition are condemned precisely because of the resulting illegal effect upon or raising of prices:

“ . . . In the cases considered by this Court since the Standard Oil Co. Case in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.” *Apex Hosiery Co. v. Leader, supra*, at 310 U. S. 500-1, 84 L. Ed. 1327.

Generally a combination in interstate commerce to raise prices violates the Anti-Trust law. Accordingly, any concerted action which affects prices is also a breach of that law—even though that result is achieved by restraints which have an indirect rather than a direct effect upon prices. Where, however, the combination to directly fix prices is legal, it cannot be a violation of the Anti-Trust Law to accomplish that legal objective by restraints direct or indirect—for in such a case, the ultimate restraint at which the law is aimed, *i. e.*, the fixing of prices, is not within the purview of the law.

The situation here can be compared to the following: A is charged with murder but it is found that he killed in self-defense. Nevertheless he is held guilty because intent to kill, one of the elements of the crime, was present. The combination of act plus intent do not constitute the crime in such a case, because the law has carved out the exception of self-defense. In the present case, we have a situation where ordinarily a restraint which affects market prices is illegal. But an exception has been carved out by the law giving fishermen the right to combine to fix market prices. Therefore, the alleged restraint which affects prices can no more be illegal than the killing in the cited example.

So in the *Apex Hosiery* case, the prevention of shipments was not a violation of the Anti-Trust law (whatever other laws may have been violated) because the fixing of wages, the end which the activity was designed to achieve, was not an illegal restraint. The same acts by a combination for the purpose of raising hosiery prices undoubtedly would have been contrary to the prohibitions of the anti-trust laws. Here the fixing of prices by a combination of fishermen is just as valid as was the fixing of wages in the *Apex Hosiery* case. Therefore, restraints upon commerce resulting from a strike to achieve that end (whatever other laws may allegedly be violated) are not contrary to the anti-trust law.

V.

**The Decision Rendered Herein Holding That the Challenge to the Jury Panels Was Properly Overruled Conflicts With the Decisions of the Supreme Court on This Subject, and a Rehearing on This Point Should, Therefore, Be Granted.**

1. **The Challenge to the Jury Panels Did Not Go to the Jurisdiction of the Court. The Denial of the Challenge Did Not Deprive the Court of Jurisdiction but It Did Constitute Error Which May Be Corrected by the Judgment of This Court.**

In the opinion herein it is stated that appellants' claim that the jury panel was drawn in a manner "so inherently defective and unfair that, even if a fair and impartial jury was obtained for this particular trial, still the cause must be reversed."<sup>1</sup> It is then stated that this seems to amount to a claim of "lack of jurisdiction" on the part of the trial court, and the conclusion is reached that "If this position is correct, the Court had no jurisdiction in any case, civil or criminal, tried by a jury. . . ." This conclusion does not conform with the law as declared by the Supreme Court.

The basis of the power to reverse on the ground that the challenge to the jury panels was improperly denied is not lack of jurisdiction of the trial court; it is the appellate court's "power of supervision over the administration of justice in federal courts." (*Thiel v. So. Pacific Ry. Co.*, 328 U. S. 217, 225, 90 L. Ed. 1181, 1187; *Faye v. New*

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<sup>1</sup>Appellants' position actually is, as the Supreme Court has held, that one of the essentials of a "fair and impartial jury" is that it be selected from a jury panel properly drawn. Therefore, as a matter of law, a jury selected from a defective panel is not fair and impartial.

*York*, 332 U. S. 261, 287, 91 L. Ed. 2043, 2059-60.) A reversal would amount to no more than action by the appellate court “to correct an error which permeated this proceeding.” *Ballard v. United States*, 329 U. S. 187, 193, 91 L. Ed. 181, 186.

Obviously the power to correct an error is exercised by appellate courts only in cases in which the point is reserved in the trial court by appropriate motion or objection and is thereafter properly raised on appeal. A decision in this case on this point would affect only these particular appellants and those who hereafter challenge the jury panels. Additionally it would affect the future administration of justice and particularly the future method of selection of jury panels. It would advise the court below that it must eliminate those practices which this court itself found so inexplicable in view of the clear Supreme Court decisions prohibiting them.

**2. Petitioners Were Not Required, in Support of Their Challenge to the Jury Panels, to Establish That They Were Personally Prejudiced by the Manner of Jury Selection.**

In the opinion herein one of grounds for sustaining the judgment of the Court below is that the appellants established no prejudice or discrimination against them resulting from the method of jury selection. Appellants were not required to make any such showing.

In *Thiel v. So. Pacific Co.*, *supra*, at 328 U. S. 219-220, 90 L. Ed. 1184, the challenge to the jury panel was based on the claim that there was discrimination in favor of “business executives or those having the employer’s viewpoint . . . thus giving majority representation to one

class or occupation and discriminating against other occupations and classes, particularly the employees and those in the poorer classes. . . .”<sup>2</sup> The trial court found that five of the jurors finally selected “belong more closely and intimately with the working man and the employee class than they do with any other class.” In the hearing before the Supreme Court it was claimed that the facts showed that petitioners in that case were not prejudiced and that, therefore, the challenge could not be considered. However, the Supreme Court disregarded the claim of lack of prejudice because, in a federal case in which the appellate court is exercising its supervisory power over the administration of justice, it is “unnecessary to determine whether the petitioner was in any way prejudiced.” (*Thiel v. So. Pacific Ry. Co.*, *supra*, at 328 U. S. 225, 90 L. Ed. 1187. See also: *Ballard v. United States*, 329 U. S. 187, 195, 91 L. Ed. 186.) The question of prejudice or lack thereof is equally immaterial in this case.

**3. The Right to a Properly Selected Panel Is Separate and Distinct From the Right to an Impartial Jury. Appellants Were Entitled to Both.**

In the opinion by this Court there is a quotation from the opinion of the trial judge in which, it is submitted, the matter of challenge to individual jurors is confused with the matter of selection of a panel of jurors. It is stated, in effect, that if an impartial jury is obtained, a party should not be allowed to complain even though the panel may have been improperly selected.

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<sup>2</sup>This challenge was sustained by the Supreme Court. In this case, however, appellants and counsel have been castigated by this court for making and trying to prove a similar challenge. This matter will be discussed further below.



The rule is, however, that a party is entitled to an "impartial jury drawn from a cross-section of the community." (*Thiel v. So. Pacific Ry. Co.*, *supra*, at 328 U. S. 220, 90 L. Ed. 1184.) In other words, it is necessary, in the first instance, that the panel be selected according to the concept that it be a cross-section of the community, and it is from such a panel that an impartial jury must be drawn. If the panel is not selected in a manner calculated to attain a cross-section of the community, the error has been committed, regardless of what occurs thereafter. In this case, the challenge of the appellants went to the manner of selecting panel and not to the individual jurors who were chosen from that panel.

4. **Appellants' Challenge Based Upon the Ground That the Jury Panels Were Not Selected in a Manner Calculated to Achieve a Cross-section of the Community Was Based Upon Democratic Principles and Was Not, as Is Asserted in the Opinion, an Attack on Democracy.**

In sharp and passionate language the opinion condemns the challenge to the jury panels as an attack on democracy itself. The opinion goes so far as to say that by the challenge ". . . it is attempted to overthrow the jury system by the injection of concepts of class conflicts."

The opinion argues ardently for the proposition that a jury selected from the social register can render equal justice with a jury "drawn from the habitues of park benches." Yet, even in this opinion, it was found necessary to concede that the use of such lists drawn, for example, from "a women's social organization" is not proper. How these two propositions may be reconciled is not made clear.

This Court's defense of a jury composed entirely of socialites flies directly in the teeth of Supreme Court decisions. In the *Thiel* case, the court noted that discrimination against "those of low economic and *social* status" would "breathe life into any latent tendencies to establish the jury as an instrument of the economic and *socially* privileged." (Emphasis added.) Any tendency toward such discrimination was unequivocally condemned. 328 U. S. 223-4, 90 L. Ed. 1186.

It is significant that although the Supreme Court in all of its recent decisions has referred to the necessity that juries constitute a cross-section of the community, this court in its opinion ignores this phrase and this concept. It is true that the opinion includes a quotation from the trial judge stating that the requirements that a jury be a cross-section of the community "would seem not to be objectionable." But the Supreme Court of the United States has not limited itself to the proposition that the requirement of a cross-section is not objectionable; according to its rulings, *the effectuation of this concept is required.*<sup>3</sup>

Rather than attempting to overthrow the jury system by the "injection of concepts of class conflict," appellants seek to maintain the jury panel as a "body truly representative of the community"—as the Supreme Court has

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<sup>3</sup>The court states in its opinion that if appellants obtained their objective, "each citizen would have to be tried by members of his particular segment of the population." This statement of appellants' position is so much in conflict with everything that appellants have urged in their briefs and in the argument, that they are at a loss to understand it. It has always been appellants' position that an individual, be he Catholic, Mason, Jew, banker or bricklayer, is entitled to the same kind of a jury—a jury representative of the community—the exact opposite of a jury made up of "members of his own particular segment of the population."

said is required for "the proper functioning of the jury system, and, indeed, our democracy itself." It is the Supreme Court which has said that a jury must not be "the organ of any special group or class;" it is the Supreme Court which has condemned the methods of selection of jurors "which do not comport with the concept of the jury as a cross-section of the community." (*Glasser v. United States*, 315 U. S. 60, 85-86, 86 L. Ed. 680, 707. See also *Smith v. Texas*, 311 U. S. 128, 130, 85 L. Ed. 84, 86; *Thiel v. So. Pacific Ry. Co.*, *supra*.)

In the *Thiel* case, the Supreme Court pointed out that to disregard these concepts "is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury"—this in a case in which, as noted above, the challenge to the method of selection was based upon the grounds that it resulted in the inclusion on the jury panel of too many "business executives or those having the employer's viewpoint" and discriminated against "other occupations or classes, particularly the employees and those in the poorer classes." It is submitted that it is the opinion of this Court of Appeals—not the position taken by the petitioners—which opens "the door to class distinctions and discriminations."

**5. The Admittedly Improper Selection of Names From Special Private Sources Is in Itself a Sufficient Basis for Sustaining the Challenge to the Jury Panels.**

The Court in its opinion concedes that the use of special lists was improper. It states, however, that the names drawn therefrom were an extremely small part of the total number of names used, that the names were largely selected from the telephone book, and that each name submitted by

the jury commissioner was balanced by one selected from the list of approximately 30,000 former jurors. The Court concludes that "the deviations here were comparatively minor and laid no field for the attack which has been made."

While holding that the deviations from a proper method of selection were "comparatively minor," the opinion gives no guidance whatsoever as to the distinction between improprieties "comparatively minor" and those comparatively major, the latter of which assumedly would constitute an appropriate basis for challenge. This issue of how substantial wrongful methods of selection must be before they will be stricken down is not an unimportant one. Nor is it one on which there is no authority. The Supreme Court has stated the rule:

*"Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted."*<sup>4</sup> *Glasser v. United States, supra*, at 315 U. S. 86, 86 L. Ed. 707. (Emphasis added.)

Here there was admittedly more than a slight tendency; there was an actual deviation from proper practices which actual deviation, the opinion says, is "comparatively minor." Furthermore, here the jury commissioner has

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<sup>4</sup>Here, for such resistances, counsel have received the censure of this court. This matter will be discussed further below.

done precisely that which the Supreme Court has specifically condemned:

“The deliberate selection of jurors from the membership of particular private organizations does not conform to the traditional requirements of a jury trial.” *Glasser v. United States, supra*, at 315 U. S. 86, 86 L. Ed. 707.

This rule is not limited to situations in which all or a large part of the jury is so selected. It was followed in a case in which part of the jurors were selected from private organizations, and in that case the jury was characterized as “the organ of a special class.” (*Glasser v. United States, supra* at 315 U. S. 87, 86 L. Ed. 708.) It is submitted that this Court while citing the *Glasser* case has not followed it.

Moreover, the opinion makes no analysis of this “comparatively minor” deviation. In the *Thiel* case, the Court noted as evidence of discrimination the fact that at least 50% of the jury list was composed of businessmen and their wives. (328 U. S. 222, 90 L. Ed. 1186.) Here, the showing is equally strong, if not stronger. The grand jury which returned the indictment contained no laborers, no working men, no representatives of those in the lower economic categories constituting considerably more than 50% of the population. Fourteen out of 19 of its members were in the general category of businessmen. On the panel from which the grand jury was selected 21 out of 33 were in this category. If the fact that 50% of the members of the panel were businessmen is deemed signifi-

cant in the *Thiel* case, why is the showing here “comparatively minor?”

The only complete specific testimony as to the sources from which the jurors were obtained covers the period from 1943 to 1947. But the evidence with respect to this period furnishes a good test of the composition of the entire jury panel because the testimony shows without contradiction that the method of selection used during the years 1943 to 1947 is typical of that used for the past 16-year period. In the period 1943-1947 the jury commissioner submitted a total of 6,712 names. Of these 1,680, or almost 25%, came from the society Blue Book.<sup>5</sup> This means that on an average jury, three out of twelve jurors would be specially selected socialites. It is submitted that this is hardly “comparatively minor” in a case in which a vote of one juror may spell the difference between conviction and failure to convict.

The fact that some names were taken from lists prepared prior to 1943 does not change the picture because the method used prior to 1943 is the same as that used thereafter. [Tr. pp. 2159-2160.] Therefore, the names selected from the accumulated cards were subject at least

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<sup>5</sup>Although this point is not discussed specifically or directly in the opinion, it is submitted that there is no difference in principle between selection of names from a social register and selection of names from a social club, for such selection in both instances has the effect of favoring the “economically and socially privileged” and thereby discriminating against “those of low economic and social status,”—which is the basis for the condemnation by the Supreme Court of any such selective selection.

to the same deficiencies as those selected from the list furnished by the jury commissioner during the period 1943-1947.

The foregoing leaves out of consideration the fact that additional names were considered taken from the Ebell Club, the Friday Morning Club and also an insurance company list of registered car owners. It also eliminates from consideration the question as to whether the telephone book as a source is itself representative of a community. At the very least, this Court should squarely face and analyze the facts with respect to the use of names from the society Blue Book and determine whether or not that constitutes such a "comparatively minor" deviation, as to permit such use to be continued. For critical as the Court is of the violations of Supreme Court decisions "at least in the letter," its opinion permits their continuance as "minor deviations." If the use of these lists is so erroneous that its discontinuance is required, then their use in this case was error and this case should be reversed. Only if such use is not so erroneous as to require its discontinuance, should the decision herein be allowed to stand. It is submitted that under the decisions of the Supreme Court, the continuance of the practice may not be tolerated and, therefore, this petition for rehearing should be granted.

VI.

**The Censure of Counsel for Appellants Is Unwarranted  
and Grossly Unfair.**

In a case in which there is not the slightest indication that the Trial Court or any of the parties considered that appellants' counsel were to the slightest extent guilty of misconduct and in which no question of misconduct was raised at any point in the proceedings before this Court, the opinion attacks counsel with a bitterness and vehemence hardly equalled in any case in which counsel was actually charged with contempt of court. It is asserted in the opinion that in the Trial Court there was an attempt by counsel to bring the administration of law into disrepute. It is stated that counsel engaged in "preposterous and outlandish tactics" amounting to an obstruction of justice, and counsel were censured.

All this without stating how, when or in what manner counsel so conducted themselves as to merit this serious reprimand—unless it be that the very presentation and the urging of the challenge to the jury panels is itself the subject of the attack.

All this in a case in which the opinion of this Court itself concedes that the matter was presented with "earnestness," and that there actually were departures from a proper method of jury selection which were "surprising." Yet the effect of the opinion is to leave the "surprising" violations in effect and to censure counsel who uncovered them.

All this in a case in which the trial judge is referred to as behaving with "conscientiousness" when, "faced with certain appellate expressions," he permitted a complete presentation of evidence and argument. Should counsel



for appellants have exercised less "conscientiousness" than the trial judge when they, *faced with the same appellate expressions*, presented and urged the challenge on behalf of their clients? What this Court considers "conscientiousness" on behalf of the trial court (and we believe correctly so) is condemned as an obstruction of the administration of justice on the part of counsel. The charged misconduct of counsel according to the opinion arises out of the fact that they presented the challenge "with tremendous force," with "earnestness" and with "circumstantiality." Ordinarily counsel are praised, as indeed they were by the trial court, for such devotion and zeal for the cause of their clients; here they are reprimanded.

All this in the face of the duties imposed upon an attorney by law and by the ethics of his profession to present vigorously on behalf of his clients all points of law and fact which he believes might be helpful to his client's cause.

"A lawyer, when engaged in the trial of a case, is not only vested with the right, but under his oath as such officer of the court, is charged with the duty of safeguarding the interests of his client in the trial of an issue involving such interests. For this purpose, in a trial, it is his sworn duty, when the cause requires it, to offer testimony in behalf of his client or in support of his case in accordance with his theory of the case, to object to testimony offered by his adversary, to interrogate witnesses, and to present and argue to the court his objections or points touching the legal propriety or impropriety of the testimony or of particular questions propounded to the witnesses. If, in discharging this duty, he happens to be persistent or vehement or both in the presentation of his points, he is still, nevertheless, within his legiti-

mate rights as an attorney, so long as his language is not offensive or in contravention of the common rules of decorum and propriety. As well may be expected in forensic polemics, he cannot always be right, and may wholly be wrong in his position upon the legal question under argument, and to the mind of the court so plainly wrong that the latter may conceive that it requires no enlightenment from the argument of counsel. But, whether right or wrong, he has the right to an opportunity to present his theory of the case on any occasion where the exigency of the pending point in his judgment requires or justifies it.”—*Platnauer v. Superior Court*, 32 Cal. App. 463, 474-475.

Even if the trial court in this case had sought to restrict counsel in the presentation of this matter, it would have been counsels’ right and duty nevertheless to urge their theory of the law. But what is remarkable about this court’s censure in this case is that the matter was presented before a trial judge who indicated at all times that he wanted a full and complete record upon which to base his decision.

Counsel’s original estimate of time for the presentation of direct testimony—excluding cross-examination—was two to three hours. [Tr. p. 1963.] The Government counsel said that they also had witnesses on the matter. [Tr. p. 1946.] The Court itself suggested that the jury be excused for a couple of days instead of just one day as suggested by counsel for appellants. [Tr. p. 1964.] As the matter was presented it took on greater proportions because of the developments of facts not all of which were known to the parties at the time that the hearing was commenced. The judge himself believed that there was suffi-

cient merit to the challenge to require a thorough exploration of all the facts. He constantly participated in the examination of witnesses and in many instances completely took over the examination for varying periods of time.<sup>6</sup>

Also remarkable is the fact that there were no hotly contested issues as to the admissibility of evidence. During the entire presentation of evidence by petitioners herein there were less than a dozen Government objections, most of which were overruled. [See: Tr. pp. 2008, 2014-15, 2154, 2229-30, 2285-95, 2299, 2331, 2367-8, 2373, 2484.] The trial judge himself indicated "there isn't any clear or definite or ascertainable or easily ascertainable standard as to what is relevant or material in such an inquiry . . .", and accordingly leaned toward the position that the inquiry should be broad in order to give the Court the most complete basis possible for its decision. [Tr. pp. 2520-2521.] In this connection, the trial judge himself called the Clerk of the Los Angeles County Superior Court as the Court's witness. [Tr. pp. 2190-2210.]

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<sup>6</sup>For example, the direct examination of one witness appears at Tr. 1968 to 2007 [All figures for pages are inclusive]. The court took over the examination of the witness for varying periods of time at Tr. pp. 1981-7, 1988-93, 1995-6, 1998-2001, or a total of 16 to 19 pages out of 40. In addition, he asked one or more questions on each of the following pages: Tr. 1972-7, 1980, 1997, 2006-7, or an additional 10 out of the 40 pages. There was further direct examination of the same witness at Tr. pp. 2009-2050. The Court took over the examination at Tr. pp. 2010-11, 2028-30, 2031-33, 2044-50, or a total of approximately 15 out of 42 pages. He asked one or more questions at pages 2012, 2017-21, 2026-27, 2034-36, 2038-41 and 2043, or an additional 16 out of 42 pages. An examination of the balance of the record will show that on direct examination by counsel of their witnesses, the trial judge conducted from 25% to 50% of the questioning.

The foregoing is stated not by way of criticism, direct or implied, of the trial judge. Rather it is set forth to show that the trial judge himself was interested in and participated in the full development of the facts.

The trial judge, who is highly praised in the opinion of this Court, never took the position that the contentions advanced by petitioners were entirely without basis. As a matter of fact in his opinion he said: "It is arguable that the Thiel case . . . established several other broad and far-reaching propositions which may be generally stated as follows:". He then set forth petitioners' contentions as he understood them. Thereafter he proceeded to hold against each of the contentions, *in each case*, however, referring to them as "*arguable contentions*." [Tr. pp. 2527-2533.] Thus, we have the situation here where counsel are castigated by the Appellate Court for advancing contentions deemed to be arguable by a trial judge, whom the Court in its opinion highly praises for his handling of the case.

Further the Trial Judge praised counsel for the manner in which the challenge was presented. Thus, in his opinion, he said:

"Be it also said that counsel for the defendants, in support of their motion, instead of limiting their tactics to merely an attack upon the methods used, have very commendably sought to produce by evidence and in argument suggestions which were calculated to aid the officials of this court charged with the very difficult task of selecting jurors, to find a better way than the one under assault." [Tr. p. 2525.]

In addition there are portions of the typewritten transcript<sup>7</sup> in which the trial judge indicated his approval of the manner in which counsel handled the case. Thus, after all of the evidence was in, he said to one of appellants' counsel with respect to this:

"I appreciate your approach to the argument. You have been of considerable help." [Typewritten Tr. p. 896.]

At the conclusion of argument by both sides, the trial judge said:

"The Court: I am afraid I will not be able to come to a conclusion of this matter very rapidly. I have already given the matter a great deal of study, but I still have to work myself out of the woods. I appreciate the efforts counsel has put in on both sides. I think you have demonstrated what I indicated at the beginning, that you had acumen and industry." [Typewritten Tr. p. 1027.]

Thereafter, the trial judge continued the matter for approximately 12 days because he wanted to study it before rendering his decision. Just before continuing the matter from February 28 to March 12, 1948, he said:

"I seriously want to thank all counsel on both sides for the magnificent efforts they have made and for the very great aid which you will have given me in this matter." [Typewritten Tr. p. 1159.]

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<sup>7</sup>These portions of the record were not included in the printed record because no issue had been raised as to the conduct of counsel. A certified copy of these portions of the record is being filed herewith.

Yet it is for such conduct this Court said:

“The attempt, we believe, was to bring the administration of the law into disrepute. The preposterous and outlandish tactics of the defense amounted to an obstruction of justice in and of itself. Such tactics on the part of defense attorneys in our opinion deserves censure. We now pass it.”\*\*

In concluding on this point, the attention of the Court is directed to two matters: first, the effect of the Court's censure upon counsel themselves; and second, the effect upon the bar as a whole. With respect to the first, a permanent record is being made in which counsel upon the basis of the facts above set forth have been condemned by this Court before their profession and for the whole world to see. Years from now, political or other enemies of any of counsel can point to this opinion and utilize it as a basis for attacking their competency and integrity. Counsel would hardly be human if they did not feel strongly about this.

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\*\*Equally unfair and unsupported is the statement of this Court that counsel exhausted their peremptory challenges in order to place them in proper technical position to challenge the array, and asked for additional challenges “as a gesture.” No basis is stated for this conclusion as to the intent of counsel and none there is in the record. Apparently the Court, having made the assumption that counsel acted in bad faith, that assumption is applied without factual support therefor. Counsel state without equivocation that these assertions in the opinion are without basis in fact, that counsel were not satisfied with the jury at any time, that they used their challenges in an attempt to eliminate the persons who were unsatisfactory to them, and that they finally went to trial before a jury which was not acceptable to them after their request for additional challenges was denied.

Second, and more important, however, is the effect on the bar. Whatever the outer limits of permissible advocacy may be—and it is not necessary to determine them here—they most assuredly embrace the presentation to federal courts of propositions enunciated in decisions of the Supreme Court of the United States and supported by facts independently proven.

The practice of law has indeed become a dangerous business if the censure here passed is allowed to stand. If such censure is to be imposed here, what can an attorney safely do in defending his clients? Must he ask himself first of all, "Does the trial court approve what I am doing and think that I am right in the position that I am advancing"? and second, "Even if the trial court thinks that what I am doing is proper, will an appellate court someday censure me because I have raised, fully presented and strenuously argued this point?" When such questions have to be asked by attorneys who are interested in protecting their reputation, a free, courageous bar can no longer exist.

Most of the landmark decisions have been rendered in cases handled by attorneys who recognized their obligations to their clients and their duty to fight for principles which they thought were or should be the law—even where trial judges sought to prevent the presentation of the points and even where intermediate appellate courts condemned the position presented as being untenable or absurd. This decision constitutes a barrier which only the

most devoted and most principled of lawyers will be able to surmount in order to continue the great contribution of the bar to our continually developing traditions and broadening concepts of such things as freedom, due process and fairness.

### Conclusion.

In its opinion, the Court assumed the legality of the price fixing agreement sought by the fishermen, and held that this issue did not have to be decided. Yet the question as to the legality of that agreement goes to the very heart of this case. Appellants submit that upon further consideration of this matter it would become clear that the price fixing agreement was permissible under the terms of the Fishermen's Marketing Act and that a strike to secure such an agreement and the restraints upon commerce which flow from such a strike are no more the "kind" of restraints which violate the Sherman Act than are similar restraints resulting from strike activities by a labor union to secure a collective bargaining agreement.

With respect to the jury challenge it is submitted that the opinion incorrectly applies the leading Supreme Court cases on the point and that a correct application supports Petitioners' position. It is further submitted that the censure of counsel is unwarranted and unfair.

For all of the foregoing reasons it is respectfully submitted that a rehearing should be granted, that the decision of the court below should be reversed in all respects



and that the portions of the opinion censuring counsel should be stricken from the record.

Respectfully submitted,

KENNY AND COHN,

GLADSTEIN, ANDERSEN, RESNER AND  
SAWYER,

MARGOLIS & McTERNAN,

ROBERT W. KENNY,

BEN MARGOLIS,

GEORGE R. ANDERSEN,

By ROBERT W. KENNY,

*Attorneys for Appellants.*

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### Certificate of Counsel.

I am one of the attorneys for the appellants. It is my judgment that this Petition for Rehearing is well founded and not interposed for delay.

ROBERT W. KENNY.







No. 11639

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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HANSEN & ROWLAND, INC., a corporation,  
Appellant,  
vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,  
Appellees.

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Transcript of Record

IN TWO VOLUMES

VOLUME I

Pages 1 to 466

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division



No. 11639

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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HANSEN & ROWLAND, INC., a corporation,  
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United States District Attorney

HARRY SAGER, Esq.

Assistant United States District Attorney

324 Federal Building, Tacoma, Washington

Attorneys for Defendant-Appellants.

In the Superior Court of the State of Washington  
In and For the County of Pierce

556

No. 89705

HANSEN AND ROWLAND, INC., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, Incorporated, a corporation,  
and GREEN CONSTRUCTION  
COMPANY, a corporation,  
Defendants.

Certified Copy of Entire Record on Removal from  
the Superior Court of the State of Washington In  
and For Pierce County, Washington to the United  
States District Court of the Western District of  
Washington, Southern Division at Tacoma.

[Endorsed]: Filed in the United States District  
Court, Western District of Washington, Southern  
Division, Aug. 13, 1943. [1\*]

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[Title of Superior Court and Cause.]

### COMPLAINT

Plaintiff complaining of Defendants, says:

#### I.

Plaintiff is a corporation organized under the

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\*Page numbering appearing at foot of page of original certified  
Transcript of Record.

laws of the State of Washington, and has paid its annual license fees to the State of Washington for the year last past.

II.

Defendant, C. F. Lytle Company, Incorporated, is a corporation organized under the laws of the State of Iowa, and doing business in the State of Washington.

III.

Green Construction Company is a corporation organized under the laws of the State of Iowa and doing business in the State of Washington.

IV.

That on the 17th day of July, 1942, Phoenix Indemnity Company, a corporation, authorized to do business as surety in the State of Washington and Territory of Alaska, at the special instance and request of Defendants, issued its certain policy of insurance No. C. L. P. 1750, to Defendants, at Tacoma, Washington, insuring and protecting Defendants, and each of them, from legal liability and damages against bodily injury liability, automobile property damage [2] liability, and property damage liability other than automobile, within certain limits described in said policy, on account of the performance of certain work and activities by said Defendants, which work and activities are described in said policy.

V.

That as a consideration and premium for the in-

insurance and indemnity afforded by said policy of insurance, said Defendants agreed to pay to said Phoenix Indemnity Company eighty-five cents on each one hundred dollars of all remuneration earned by the employees of Defendants and the employers of any contractors and subcontractors associated with or employed by Defendants in connection with the performance of said work and activities described in said policy of insurance.

## VI.

That during the period said insurance was in effect, from June 17th 1942, to September 1st, 1942, the remuneration earned by employees of Defendants, and contractors and subcontractors associated with nor employed by them in connection with the work and activities performed by them described in said policy, and on which premiums became payable under said policy, amounted to the sum of \$1,055,214.02.

## VII.

That said policy of insurance contained among others, the following provisions:

“Cancellation. This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancelation shall be effective. The mailing of [3] notice as aforesaid shall be sufficient proof of notice

and the insurance under this policy shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

“If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company’s check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.”

### VIII.

That in accordance with said policy of insurance providing for cancelation, said Defendants on September 3rd, 1942, by writing addressed to Hansen & Rowland, Inc., canceled said policy of insurance effective September 1st, 1942.

### IX.

That based on the premium rate on account of earned payroll of the employees of Defendants and associated contractors and subcontractors in the performance of said work and activities, the earned premium computed in accordance with the customary short rate table and procedure was and is the sum of \$16,153.73, and by reason of the facts

herein above set forth, Defendants became indebted to said Phoenix Indemnity Company in the sum of \$16,153.73, no part of which has been paid. [4]

#### X.

That on October 7th, 1942, said Phoenix Indemnity Company furnished and delivered to Defendants a statement of its account and of the amount owing by Defendants to Phoenix Indemnity Company, which account and statement was in the sum of \$16,153.73.

#### XI.

That on January 30, 1943, Defendants assented in writing to said statement of account, so rendered to them by Phoenix Indemnity Company, and admitted their liability to pay the same.

#### XII.

The said Phoenix Indemnity Company has, by instrument in writing, duly assigned its said claim and demand against Defendants to Plaintiff, who is the owner and holder thereof.

Wherefore, Plaintiff prays judgment against Defendants, and each of them, in the sum of \$16,153.73, with interest at six per cent per annum from September 1st, 1942, and for costs of suit.

CHARLES T. PETERSON  
LESTER SEINFELD,

Attorneys for Plaintiff.



State of Washington,  
County of Pierce—ss.

I. C. Rowland, being first duly sworn, on oath deposes and says:

That he is the Secretary of Hansen & Rowland, Inc. a corporation, Plaintiff above named, and makes this verification for and in its behalf; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

I. C. ROWLAND. [5]

Subscribed and sworn to before me this 10th day of July A. D. 1943.

[Seal]            A. VAN R. SCHERMERHORN  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed in County Clerks Office.  
Pierce County, Wash., Aug. 5, 1943. [6]

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[Title of Superior Court and Cause.]

### SUMMONS

The State of Washington to C. F. Lytle Company,  
Incorporated, a corporation, and Green Construction Company, a corporation, Defendants.

You Are Hereby Summoned to appear within twenty days after service of this summons upon you, exclusive of the day of service, if served within the State of Washington; or within sixty days after service upon you, exclusive of the dat of service, if

served out of the State of Washington, and answer the complaint and serve a copy of your answer upon the undersigned at the place below specified, and defend the above entitled action in the Court aforesaid, and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which will be filed with the Clerk of said Court, a copy of which is hereby served upon you.

CHARLES T. PETERSON  
LESTER SEINFELD

Attorneys for Plaintiff.

[Endorsed]: Filed in County Clerks Office Aug.  
5, 1943. [7]

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[Title of Superior Court and Cause.]

NOTICE OF FILING AND PRESENTATION  
OF PETITION AND BOND FOR REMOVAL

To: Hansen & Rowland, Inc., a corporation, plaintiff, and Charles T. Peterson and Lester Seinfeld, its attorneys:

You, and each of you, are hereby notified that the defendants above named, on Monday, the 2nd day of August, 1943, will file, in the Superior Court of the State of Washington, Pierce County, their petition and bond for the removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Southern Division, and that they will thereafter, on the 2nd day of August, 1943, present to the presiding judge of

the said Superior Court their said petition and request the said Court for an order approving said bond and ordering the removal of this action to the said District Court of the United States for the Western District of Washington, Southern Division, all in accordance with the terms of said petition, copies of which petition and bond are hereto attached.

Dated this 30th day of July, 1943.

J. CHARLES DENNIS

HARRY SAGER,

Attorneys for Defendants.

Copy received 2nd day of August 1943.

CHARLES T. PETERSON

Attorney for Plaintiff. R.V.P.

[Endorsed]: Filed in County Clerks Office,  
Pierce County, Wash., Aug. 2, 1943. [8]

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[Title of Superior Court and Cause.]

### PETITION FOR REMOVAL

Come now the defendants above named, and for their petition herein respectfully represent to the court as follows:

#### I.

That the above entitled action is an action at law of a civil nature, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

## II.

That the plaintiff, Hansen and Rowland, Inc., is a corporation organized and existing under the laws of the State of Washington, and as such, is a citizen of the State of Washington. That the defendants, C. F. Lytle Co., Inc. and Green Construction Co., and each of them are corporations organized and existing under and by virtue of the laws of the State of Iowa, and as such they are citizens of the State of Iowa. That the citizen status of the respective parties to this cause, as herein alleged, has been the same at all times since prior to the commencement of this action. That this action is, therefore, one between citizens of different states.

[9]

## III.

That your petitioners, the defendants in this cause, offer herewith a bond, with good and sufficient surety, conditioned for their entry and filing, in the District Court of the United States for the Western District of Washington, Southern Division, within 30 days of the filing of this petition, a certified copy of the record of this action in this Court, and for paying all costs that may be awarded by the said District Court of the United States if said District Court shall hold that this action is wrongfully or improperly removed thereto.

Wherefore, your petitioners pray that the above entitled Court accept said bond, and that it proceed no further in this cause, except to order the removal thereof to the District Court of the United States for the Western District of Washington,

Southern Division, and that it direct the Clerk of the Above entitled Court to prepare a complete transcript and copy of the record in the above entitled action, and certify the same as being a true copy of such record, so that your petitioners may file said certified record with the District Court of the United States for the Western District of Washington, Southern Division.

J. CHARLES DENNIS

HARRY SAGER

Attorneys for Defendants.

State of Washington,  
County of Pierce—ss.

George Roach, being first duly sworn, upon his oath, deposes and says: That he is Branch Manager for the defendant C. F. Lytle Co., Inc., a corporation, and one of the defendants and petitioners herein, and as such Branch Manager, he is authorized and does make this verification [10] for and on behalf of said defendant; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

GEORGE ROACH.

Subscribed and sworn to before me this 30th day of July, 1943.

HARRY SAGER

Notary Public in and for the State of Washington,  
residing at Sumner.

[Endorsed]: Filed in County Clerks Office,  
Pierce County, Wash. Aug. 2, 1943. [11]

[Title of Superior Court and Cause.]

UNITED STATES FIDELITY AND  
GUARANTY COMPANY

Baltimore, Maryland

No. 17737

\$500.00

BOND

Know All Men by These Presents:

That we, the C. F. Lytle Company, a corporation, and Green Construction Co., a corporation, the above named defendants, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound to Hansen & Rowland, Inc., a corporation, plaintiff in the above entitled cause, their successors and assigns, in the sum of Five Hundred Dollars (\$500.00) lawful money of the United States of America, for the payment of which, well and truly to be made, we and each of us bind ourselves, our successors and assigns, jointly and severally by these presents. Consideration of this obligation is such that:

Whereas, the said C. F. Lytle Company, a corporation and Green Construction Co., a corporation, have applied by petition to the Superior Court, Pierce County, State of Washington, for the removal of the above entitled cause therein pending to the United States District Court for the Western District of Washington, Southern Division, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action in said Superior Court of Pierce County, State of Washington, be stayed: [12]

Now, Therefore, if the said petitioners, the C. F. Lytle Company, a corporation, and Green Construction Co., a corporation, shall enter in the said United States District court for the Western District of Washington, Southern Division aforesaid, within thirty (30) days from the date of filing of said petition, a certified copy of the record in such suit and shall pay, or cause to be paid, all costs that may be awarded by said District Court of the United States if the said court shall hold that said suit was wrongfully or improperly removed thereto: then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof we, the above and undersigned named principals and surety have *cause* this instrument to be executed and our hands and seals affixed thereto this 30th day of July, 1943.

C. F. LYTLE COMPANY,  
a corporation, and  
GREEN CONSTRUCTION CO.,  
a corporation.

By GEORGE ROACH  
Their Attorney-in-Fact,  
Principals.

[Corporate Seal] UNITED STATES FIDELITY  
& GUARANTY CO.,

By ELWIN A. DEYO  
Surety  
Its Attorney in Fact.

Entered Journal U, Page 136.

[Endorsed]: Filed in County Clerks Office Aug.  
2, 1943, Pierce County, Wash. [13]

State of Washington,  
County of Pierce—ss.

On this 30th day of July, 1943, before me personally appeared Elwin A. Deyo, to me *know* to be the Attorney-In-Fact of the Corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and *prop*oses therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]                      W. F. KERR

Notary Public in and for the State of Washington,  
residing Tacoma.

State of Washington,  
County of Pierce—ss.

On this 30th day of July, 1943, before me personally appeared George Roach, to me known to be the individual who executed the within and foregoing instrument as Attorney-In-Fact for the C. F. Lytle Co., Incorporated, a corporation, and the Green Construction Co., a corporation, and acknowledged said instrument to be the free and voluntary act and deed of said corporations, for the uses and purposes therein mentioned, and on oath stated that he was the Attorney-In-Fact for said corporations,



and that he was authorized to execute said instrument for and on behalf of said corporations.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

G. A. B. DOVELL

Notary Public in and for the State of Washington,  
residing in Tacoma. [14]

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[Title of Superior Court and Cause.]

### ORDER OF REMOVAL

The above entitled matter coming on regularly before the Court upon the application and petition of the defendants, petitioning for the removal of the above entitled cause to the District Court for the Western District of Washington, Southern Division; and it appearing to the Court that notice of the filing of said petition and bond has been given to the plaintiff; and, further, that said petitioners have filed herein a bond with good and sufficient surety, conditioned for their filing in the District Court of the United States for the Western District of Washington, Southern Division, within 30 days of the date of filing of said petition, a certified copy of the record in this cause and Court, and for paying all costs that may be awarded by the said District Court if it shall hold that said cause was wrongfully or improperly removed thereto; and it further appearing that this is a cause of a civil

nature, between citizens of different states, and that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00); and the Court being fully advised in the premises, it is therefore

Ordered that the above entitled action be, and the same hereby is, removed in its entirety from this Court to the District Court of the United States for the Western District of Washington, Southern Division; that any further [15] proceedings in this Court be, and the same are, hereby stayed; that the Clerk of this Court be and she hereby is instructed and directed to prepare and certify a complete transcript and copy of the records and files in this cause, and to deliver the same to the Attorneys for the defendants upon their payment of the statutory fee therefor. It is further

Ordered that the bond heretofore filed in this cause by the defendants be, and the same hereby is, approved.

Done in Open Court this 2 day of Aug. 1943.

By the Court

E. D. HODGE

Judge.

Presented by:

HARRY SAGER

Attorney for Defendants.

O.K.

CHARLES T. PETERSON

Attorney for Plaintiff.

[Endorsed]: Filed in County Clerks Office Aug.  
2, 1943, Pierce County, Wash.

Entered Jour 274, Page 52. [16]

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[Title of Superior Court and Cause.]

CERTIFICATE OF REMOVAL TO U. S.  
DISTRICT COURT

State of Washington,  
County of Pierce—ss.

I, Kathryn E. Malstrom, County Clerk, and by virtue of the Laws of the State of Washington, ex-officio Clerk of the Superior Court of the State of Washington, in and for Pierce County, do hereby certify that I have compared the foregoing copy of the Complaint, Summons, Notice of Filing Petition and Bond for Removal, Petition for Removal, Bond and Order of Removal, to the United States District Court, for the Western District of Washington, Southern Division, at Tacoma, with the originals in the above entitled action, now on file and of record in this office, and that the same is a true and correct copy of the whole and every part of the original record in said action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Superior Court, at my office in the City of Tacoma, this 10th day of August, 1943.

[Seal]

KATHRYN E. MALSTROM,  
County Clerk.

By E. M. OSTROM,  
Deputy. [17]

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United States District Court, Western District of  
Washington, Southern Division

No. 556

HANSEN & ROWLAND, INC., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation, and  
GREEN CONSTRUCTION COMPANY, a  
corporation,

Defendant.

## SECOND AMENDED ANSWER

Comes now the defendants, and for their answer to the plaintiff's complaint admit, deny, and allege as follows:

### I.

Answering paragraph VI of said complaint, defendants deny the same and the whole thereof, and specifically deny that the remuneration earned by employees of defendants, and contractors and sub-

contractors associated with or employed by them in connection with the work and activities performed by them as described in said policy, exceeded the sum of \$3745.00.

## II.

Answering paragraph IX of said complaint, defendants deny the same and specifically deny that the defendants became indebted to said Phoenix Indemnity Company in the sum of \$16,153.73 or in any sum in excess of \$8.59. Defendants admit that no part of said premium has been paid.

## III.

Answering paragraph X of said complaint, defendants admit that on October 7, 1942, said Phoenix Indemnity Company furnished and delivered to defendants, a statement claiming premium due in the sum of \$16,153.73. Defendants [35] deny the remaining allegations in said paragraph.

## IV.

Answering paragraph XI of said complaint, defendants deny the same and the whole thereof.

## V.

Answering paragraph XII of said complaint, defendants allege that they have not sufficient knowledge or information of the facts therein alleged to form a belief as to the truth thereof, and therefore deny the same.

Further answering said complaint, and by way of first affirmative defense, defendants allege:

## I.

That on or about May 4, 1942 the defendants herein entered into a certain contract with the United States of America; that by the terms of said contract the defendants contracted to furnish to the said United States of America engineering-management services in the construction of a certain portion of the Alaska Highway. That the said contract is what is commonly known as a "cost plus fixed fee contract" and by the terms thereof the defendants were to be compensated by a fixed fee, and all costs incurred by defendants, in carrying out said contract, were to be repaid by the said United States. That under the terms of said contract, costs incurred by defendants in performance of the said contract were subject to the audit and approval of the Public Roads Administration, an administrative agency of the said United States.

## II.

That the premium on the insurance policy alleged in plaintiff's complaint is one of the items of costs incurred by the defendants in carrying out their said [36] contract with the United States.

## III.

That the foregoing facts were well known by the plaintiff and by the Phoenix Indemnity Company at the time of the issuance of the policy of insurance set forth in paragraph IV of the plaintiff's complaint, and at all times thereafter.

## IV.

That on or about July 30, 1942 the said policy of insurance was submitted by the plaintiff to the Public Roads Administration for approval and that at all times since, until the commencement of this action, the said Public Roads Administration carried on negotiations with the plaintiff and with the said Phoenix Indemnity Company for an adjustment of the premium alleged to be due upon said policy by the plaintiff. That in carrying on said negotiations said Public Roads Administration was acting for and on behalf of itself and of these defendants, which fact was well known to the plaintiff, and the said Phoenix Indemnity Company.

Further answering said Complaint, and by way of second affirmative defense, defendants allege:

## I.

That the writing alleged in Paragraph XI of plaintiff's complaint was written to plaintiff by defendants under a mistake of fact, which mistake of fact was as follows: That the defendants mistakenly thought and assumed that the employees engaged in performing the contract of these defendants, and of the several associate contractors, were employees of said contractors when, in fact, said persons were employees of the United States Government. [37]

## II.

That during the period in which the aforesaid insurance contract was in force certain statements of the payroll of the defendants, and associate con-

tractors, were transmitted to plaintiff for the purpose of determining the amount of premium based upon such payroll. That said statements of payroll were erroneous and mistaken in the assumption that said payrolls were payrolls of employees of the said contractors when, in truth and fact they represented the payrolls of employees of the United States Government.

Wherefor, defendants pray that judgment be entered herein in favor of the plaintiff and against the defendants for the sum of \$8.59, and for no more, and that defendants have judgment for their costs against the plaintiff.

S/ J. CHARLES DENNIS

United States Attorney

S/ HARRY SAGER

Assistant United States  
Attorney

[Endorsed]: Filed Sep. 6, 1944. [38]

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United States of America,  
Western District of Washington,  
Southern Division—ss.

Harry Sager, being first duly sworn upon his oath, deposes and says, that he is one of the attorneys for the defendants in the above entitled cause, and that he makes this verification for and on behalf of said defendants for the reason that no officer of either of said defendants is now present within the Western District of Washington; that



affiant has read the foregoing Second Amended Answer, knows the contents thereof, and believes the same to be true.

S/ HARRY SAGER

Subscribed and Sworn to before me this 6th day of September, 1944.

[Seal] G. A. B. DOVELL

Notary Public in and for the State of Washington, residing in Pierce County.

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[Title of District Court and Cause.]

## FINDING OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for trial before the Court sitting without a Jury (such trial to the Court being agreed to by the respective parties), plaintiff appearing by Charles T. Peterson and James L. Conley, its attorneys, defendant appearing by J. Chas. Dennis, U. S. District Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant U. S. Attorney; the trial of said cause proceeded by the introduction of evidence in behalf of the respective parties, and at the conclusion thereof, and after the parties respectively had rested, the Court announced that it would find for the plaintiff and against defendants, and gave counsel for defendants an opportunity to present such argument as he chose to make, and at the conclusion of such argument, the

Court found in favor of plaintiff and against defendants, and directed that Findings be submitted in accordance with such decision, and now, the Court being fully advised in the premised, doth make the following Findings of Fact and Conclusion of Law:

1. That plaintiff is a corporation organized under the laws of the State of Washington, and has paid its annual license fees to the State of Washington for the year last past. [40]

2. That defendant, C. F. Lytle Company, Incorporated, is a corporation organized under the laws of the State of Iowa, and doing business in the State of Washington;

3. That Green Construction Company is a corporation organized under the laws of the State of Iowa and doing business in the State of Washington;

4. That on or about May 4, 1942, defendants entered into a contract with the United States Government through the Agency of the Federal Works Administrator, for the construction of a portion of a highway known as the Alaska-Canada Highway, Project No. 3, from a point on the International Boundary line between Canada and Alaska to a point near Salana, Alaska, being approximately 155 miles. That by the terms of said contract defendants undertook to recruit the services of an adequate number of competent and experienced contractors with equipment and personnel, and to obtain the necessary labor to complete said roadway in the shortest possible time.

5. That said contract contained among other provisions, one by which the Federal Works Administrator reserved the right without notice to sureties, to make changes in, or additions to the original plans and specifications, and require additional work, and order work on other sections of the highway in Alaska, not included in said 155-mile section.

6. That the major portion of the work performed by defendants and said contractors under said contract, between June 17th, 1942, and September 1st, 1942, was performed on sections of said highway in Alaska outside of said 155-mile limits. That said outside sections were generally of the same character of terrain and conditions were generally the same thereon as on said 155-mile section, and the same kind of work was performed [41] on said outside sections as was described in said contract and performed on said 155-mile section.

7. That said contract contained a further provision that defendants would procure and thereafter maintain such bonds and insurance for the protection of the Government or for the protection of defendants, in such forms and in such amounts and for such periods of time as the Federal Works Administrator would approve or require as reasonably necessary.

8. That some time prior to June 10th, 1942, defendants requested three different insurance agencies, including plaintiff, to submit proposals or bids for providing public liability and property

damage insurance in connection with the work to be performed under said contract.

That on or about June 10th, 1942, defendants received a telegram from one MacDonald, Chief of the Public Roads Administration, and a person in authority, a copy of which said telegram is as follows:

CA407 51 Govt - Washington DC 10 207 P 1942, Jun 10 PM 1 34

H. L. Rice—care of C. F. Lytle Co., Sioux City, Iowa

Pending Final Information From Insurance Section of Federal Works Agency You Are Authorized To Secure Such Public Liability and Property Damage Insurance As Is Necessary to Protect the Management and Construction Contractors It Should Be Understood That These May Be Short Term Policies to Be Cancelled When Detailed Information Is Available.

### MacDONALD

9. That prior to the 17th day of June, 1942, defendants applied to plaintiff, agent for comprehensive public liability and property damage insurance, insuring them and the contractors recruited by them, against public liability and property damage. That on June 17, 1942, plaintiff, agent for Phoenix Indemnity Company, an [42] insurance company authorized to do an insurance business in the State of Washington and Territory of Alaska, issued a temporary binder effective June 17, 1942, insuring defendants and the con-

tractors recruited by them pursuant to the terms of their contracts against public liability and property damage, and on the same day delivered copies of said binder to defendants and to J. S. Bright, District Engineer, Federal Works Agency, at Seattle, Washington. That thereafter, on July 30, 1942, plaintiffs mailed duplicate originals of the policy of insurance (a copy of which was introduced in evidence herein, marked plaintiff's Exhibit "4") to the defendants, and to Federal Works Agency, Public Roads Administration, 303 Hoge Building, Seattle, Washington, attention of J. S. Bright.

10. That as a consideration and a premium for the insurance and indemnity afforded by said policy of insurance, said Defendants agreed to pay to said Phoenix Indemnity Company eighty-five cents on each one hundred dollars of all remuneration earned by the employees of defendants and the employees of any contractors and sub-contractors associated with or employed by defendants in connection with the performance of said work and activities described in said policy of insurance.

11. That said contract between the Federal Works Administrator and defendants contained the following provision:

"The Government reserves the right to pay directly to the persons concerned all sums due from the Project Manager for labor, materials, or other charges."

That in pursuance of said provision, the Govern-

ment elected to pay directly to the employees for labor performed on said project. [43]

12. That the laborers employed for the performance of the work agreed to be performed by defendants and the contractors recruited by defendants in pursuance of said contract, were recruited almost entirely by defendants, and said contractors with the approval of the Public Roads Administration, and were accepted on a civil service status, to the end that the Government might disburse public monies direct to said employees, but said employees were in fact the employees of the defendants and said contractors, and received all instructions and orders from them, and said employees were not subject to any direct orders, directions or instructions from the representatives of the United States Government in carrying on said work, and did not receive any orders or directions with respect to the manner, means or methods of doing their work from the representatives of the United States Government.

13. That during the period said insurance was in effect, from June 17th, 1942, to September 1st, 1942, the remuneration earned by employees of defendants and contractors and sub-contractors associated with or employed by them in connection with the work and activities performed by them described in said policy, and on which premiums became payable under said policy, amounted to the sum of \$1,055,214.02.

14. That said policy of insurance contained among others, the following provision:

“\*\*\*If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure.  
\*\*\*”

15. That in accordance with said policy of insurance providing for cancellation, said defendants (insured), on September 3rd, 1942, by writing addressed to Hansen & Rowland, Inc., Agents for Phoenix Indemnity Company, [44] cancelled said policy of insurance, effective September 1st, 1942.

16. That based on the premium rate on account of earned payroll of the employees of defendants and associated contractors and sub-contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and procedure was and is the sum of \$16,153.73, no part of which has been paid, although demand has been made therefor.

17. The said Phoenix Indemnity Company has heretofore by instrument in writing, duly assigned its said claim and demand against defendants to plaintiff, who is the owner and holder thereof.

Dated September 22nd, 1944.

CHARLES H. LEAVY,

United States District Judge

From the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. That plaintiff is entitled to have and recover judgment of and against defendants and each of them in the sum of \$16,153.73, with interest thereon

at the rate of six per cent per annum from September 1st, 1942, and for costs of suit.

Dated September 22, 1944. Defendants except to foregoing Findings of Fact and Conclusions of Law and exceptions allowed. (C.H.L.)

CHARLES H. LEAVY

United States District Judge

Presented by:

CHARLES T. PETERSON

Attorney for Plaintiff.

Served Sept. 14, 1944

[Endorsed]: Filed Sep. 22, 1944. [45]

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United States District Court, Western District of  
Washington, Southern Division

No. 556

HANSEN & ROWLAND, INC., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,

Defendants.

### JUDGMENT

This cause coming regularly for trial before the Court sitting without a Jury (such trial to the Court being agreed to by the respective parties),



plaintiff appearing by Charles T. Peterson and James L. Conley, its attorneys, defendant appearing by J. Chas. Dennis, U. S. District Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant U. S. Attorney; the trial of said cause proceeded by the introduction of evidence in behalf of the respective parties, and at the conclusion thereof, and after the parties respectively had rested, the Court announced that it would find for the plaintiff and against the defendants, and gave counsel for defendants an opportunity to present such argument as he chose to make, and at the conclusion of such argument, the Court found in favor of plaintiff and against defendants, and directed that Findings be submitted in accordance with such decision, and the Court having duly made its Findings of Fact and Conclusions of Law herein in writing, wherein it found for the plaintiff and against the defendants, and each of them, it is now

Ordered, Adjudged and Decreed that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover [46] of and from C. F. Lytle Company, Inc., a corporation, of the State of Iowa, and Green Construction Company, a corporation, of the State of Iowa, and each of them, the principal sum of \$16,153.73, together with interest thereon at the rate of six per cent per annum from September 1st, 1942, together with costs in the sum of \$94.00.

Dated September 22nd, 1944.

Defendants except to foregoing Judgment and exceptions allowed.

CHARLES H. LEAVY

United States District Judge

Presented by:

S/ CHARLES T. PETERSEN

Attorney for Plaintiff.

Receipt of copy of foregoing Judgment, together with copy of Findings of Fact and Conclusions of Law, is hereby acknowledged this 14th day of September, 1944.

HARRY SAGER

Attorney for Defendants,

D.B.

[Endorsed]: Filed Sep. 22, 1944. [47]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 22nd day of September, 1944.

Dated at Tacoma, Washington, this 20th day of December, 1944.

(Signed) J. CHARLES DENNIS

United States Attorney

(Signed) HARRY SAGER

Assistant United States Attorney, Attorneys for Defendants.

Copy of the within Notice of Appeal mailed to Charles T. Peterson, attorney for plaintiff, at Perkins Building, Tacoma, Washington, this 21st day of December, 1944.

E. E. REDMAYNE

Dep. Clerk.

[Endorsed]: Filed Dec. 20, 1944. [48]

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 57, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 556, Hansen & Rowland, Inc., a corporation, Plaintiff-Appellee, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants-Appellants, as required by Appellants' Designation of the Record on Ap-

peal, on file and of record in my office at Tacoma, Washington, and the same, together with the original Transcript of Testimony, consisting of pages numbered 1 to 310, inclusive, the original Statement of Points to be Relied Upon in the Circuit Court, the original Designation of Appellants of the Parts of the Record to be printed in the Circuit Court, and original exhibits, numbered as follows, to-wit: Plaintiff's Exhibits Nos. 2, 4, 6, 7, 8, 9, 10, 12, 13, 14 and 17, and Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6 and A-10, constitutes the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit. [58]

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Transcript of Testimony, consisting of pages numbered 1 to 310, inclusive, the original Statement of Points to be Relied Upon in the Circuit Court, the original Designation of Appellants of the Parts of the Record to be Printed in the Circuit Court, and original exhibits, numbered as follows: Plaintiff's Exhibits Nos. 2, 4, 6, 7, 8, 9, 10, 12, 13, 14 and 17, and Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6 and A-10.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparing, comparing and certifying the Transcript of Record on Appeal of the Defend- ant-Appellants .....	19.55

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\$24.55

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 16th day of March, 1945.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By E. E. REDMAYNE,  
Deputy. [59]

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In the District Court of the United States, for the Western District of Washington, Southern Division.

No. 556

HANSEN & ROWLAND, INC., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY, a  
corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 6th day of Septem-

ber, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, in the City of Tacoma, and State of Washington; the plaintiff appearing by its attorneys Messrs. Charles T. Peterson and J. L. Conley, and the defendants appearing by Harry Sager, Esq., Assistant United States Attorney, and

Whereupon the following proceedings were had and testimony given, to-wit: [1\*]

Mr. Peterson: Your Honor will recall that there and an application—or rather, interrogatories were propounded, and that the Court made an order for the production of certain documents. I am advised by Mr. Sager that the answers to the interrogatories are not here, and the documents as well, as I understand, likely due to the fact that Mr. Rice, who was to have produced the documents and answer the interrogatories, was away when the interrogatories and the order reached his office in Sioux City, Iowa. I understand from Mr. Sager that those will be mailed, or are likely to be here tomorrow.

We are ready to proceed, Your Honor, with the understanding that if for any reason they are not here when the time comes, or we reach them, that there will be a postponement until they get here.

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\*Page numbering appearing at foot of page of original certified Transcript.

We can go ahead today. We can get pretty much of our case in today, I think.

The Court: I just wanted to check my calendar to see where, if I did have to continue the case, whether it would be heard at an early date, and it can, apparently.

Mr. Peterson: I might state to Your Honor the interrogatories and documents are not important in our case in chief—rebuttal only.

Mr. Sager: I don't think it is necessary to reconvene the case for the Court's consideration of the documents, when they get here. They are written documents in the file and become part of the record. The Court can consider them in chambers, unless there [4] is some question about them.

The Court: Of course, I do not think it is necessary for us to decide that matter now.

Mr. Sager: I do not want to leave the impression that they will be here tomorrow. I doubt whether they will get here that soon. Mr. Rice apparently did not get back from whatever his trip was, until this past week end, and I heard indirectly from him yesterday that he was mailing them today, so if he air mails them, they may get here.

The Court: Very well, proceed.

Mr. Peterson, I have head these pleadings, but I would be glad to have you suppliment them by a statement as to the nature of your proof, and probably Mr. Sager, also desires at this time——

Mr. Peterson: Your Honor, this action is one on an account stated. I think Your Honor decided

on that pretty well in a pre-trial discussed on the matter.

The proof will show that the defendants Lytle & Company and the Green Construction Company, applied to Hansen & Rowland, insurance agents in the City of Tacoma, for public liability and property damage insurance, insuring and protecting them, as well as some twelve or fifteen unit price contractors.

So Your Honor may be familiar with the background of the thing, the Federal Works Agency entered into a contract with C. F. Lytle Company and the Green Construction Company for the construction of a hundred and fifty-five miles of the Alaska Highway, from the Canadian border to a point in Alaska. All of this work [5] was within the territorial limits of Alaska.

By the contract, the Lytle Company not only undertook to recruit labor and perform work and labor itself, but it was also authorized to recruit a number of independent contractors experienced in highway construction, and with their equipment, and put them on the work, the Lytle-Green Company to be the supervising authority over all of the sub-contractors or unit price contractors—this twelve or fifteen, whom they recruited with their equipment, and accordingly that was done.

Then, they applied to the plaintiffs for protection and indemnity insurance,—not workmen's compensation insurance, but just public liability, in connection with their activities in this project and a policy was issued in which Lytle Company and the



Green Company as the primary contractors, and they are referred to as project managers, and will be in this proceeding, I presume, were insured, and the protection as well, extended to the sub-contractors who will probably be referred to as unit contractors. They were all named assureds. The policy was to protect all parties and the unit price contractors were named as assureds in the policy, but by the terms of the policy and the arrangement with the Underwriters, Lytle and Green were made responsible for the premiums and made responsible for the reporting of the pay rolls on which the premiums were to be computed.

Your Honor will understand that the premiums were computed on a basis of 85 cents on \$100.00 of pay roll expended on the project, and notice of cancellation and all things as between the assured and the underwriters [6] was to be done through Lytle and Green—through the Lytle Company and the Green Company, who were awaiting a sort of a partnership arrangement on this proposition, although they were both corporations, and the policy was delivered. It provided for a five thousand dollar deposit premium.

Following the delivery of the policy, which was I think delivered in July, but became effective as of June 17th—I might add there that a temporary coverage was provided prior to June 17th—the policy was delivered and accepted and received by the Lytle Company and Green Company, and I think the policy was also—the coverage certificate and policy as well. Also, copies were furnished the

Public Roads Administration, and that continued in force until the 1st of September, when the policy was cancelled by the assured giving notice in accordance with the terms of the policy.

The policy contained a provision if it was cancelled by the underwriters, the pro rata premium—that would be the earned premium, would apply, but if it were cancelled by the assured Lytle & Company and Green Company, that then it could only be cancelled on a short rate basis.

Following it up until that time, the time of the cancellation became effective, a little over a million dollars in pay roll had been incurred, a million fifty-five thousand, two hundred and fourteen dollars and two cents, to be exact.

After the delivery of the policy, the Lytle—the management, Lytle and Green Company, provided the [7] assured with a statement of the pay roll from time to time. The first statement was provided by the Public Roads Administration, so that the premium could be computed, and the result was that these—this information certified by the defendants, showed that there was a pay roll of a million and fifty-five thousand, the amount I have indicated, on which a premium of some approximate—between eight thousand five hundred and nine thousand dollars straight premium was earned, but because of the cancellation by the assured, the insurance carrier was entitled to the earned premium cancelled on a short rate basis, according to a standard formula which brought the

claim, on account of the insurance, to some \$16,000.00.

In October, I think the evidence will show, a statement was rendered to Lytle and Green Company by Hansen & Rowland for the premium with a short rate addition in the amount of \$16,153.73, and no response having been received to that, on January 25th Mr.——or the Hansen & Rowland firm addressed a letter to Mr. Harvey L. Rice, who was in charge of the matter, who had negotiated the insurance at Sioux City, Iowa, calling his attention to the fact that a statement had been rendered, a long time had elapsed, and requesting payment. That letter has been before Your Honor on the pre-trial conference, to which Mr. Rice, on behalf of the defendants, replied that he had received the letter, and after some comment stated the matter should have been paid a long time ago, and that letter has also been before Your Honor on the pre-trial conference, and we have sued. We think under [8] the law that constituted and is in fact, an account stated on which we had a right to maintain the action. I think Your Honor has ruled substantially on that proposition.

Now, I suppose at this time that the matter——

The Court: Do I understand, Mr. Peterson, there never was anything paid on account of this premium?

Mr. Peterson: Nothing was paid on account of the premiums, Your Honor, and I might add that I don't know whether it will be in evidence or not, but I think Mr. Sager will agree with me that no

loss was sustained—no public liability or property damage loss was sustained during the period on this job. Nothing was paid in that connection by the company, and it is rather significant, Your Honor, during the entire job while we were off until its completion, they were fortunate enough not to have a mishap, and there was no public liability or property damage arising out of that job. I don't know whether that is important or not, but the Court may as well be advised of the fact.

Now, nothing has been paid on account of the premium demand, but the answer, Your Honor, is a general denial, and if I understand the rule correctly, that where the transaction becomes an account stated, I think Your Honor has advanced the rule on that, on a pre-trial hearing, that it then rises to the dignity of a bill or note, and can only be impeached by—the defense to it is limited to fraud, accident or mistake in fact, and I may as well call the Court's attention to the fact at this time that there is no affirmative defense set forth in the answer. [9] Those defenses under our system of Code pleading of course must be specially pleaded by way of affirmative defense, and as the matter stands——

The Court: Does not the amended answer set forth an amended defense, Mr. Peterson?

Mr. Peterson: It sets forth an amended defense——

The Court: Liability to the extent of eight dollars and something?

Mr. Peterson: No, that is admitted in the—I don't think the affirmative defense, Your Honor, raises the issue of fraud or mistake or accident.

The Court: No, I do not think it contains either fraud or mistake.

Mr. Peterson: I think, your Honor, the rule is very well settled that those are the only defenses that may be made. If you care to have authorities on the matter—but it seems so well settled from memory, that it seems unnecessary to cite them.

The Court: Mr. Sager, I will hear from you as to your contentions in this.

Mr. Sager: I think Mr. Peterson has stated—at least the factual part of his statement has been in accordance with the facts, and I can agree with most of it.

I want to clarify some statements which may lead to some misunderstanding, and I do not think they were given by Mr. Peterson with any idea of misstating the facts at all. He refers to these contractors as—these associate contractors, as unit price contractors. Now, whether or not it is important I am not sure, but [10] the contractors other than Lytle and Green, the ones named as defendants here, were working on a cost-plus and fixed fee basis, and practically the same kind of contract as Lytle and Green. They were **not** sub-contractors in any sense of the word. Under Lytle and Green they had a direct contract with the government. They were subject to the supervision and direction of Lytle and Green. Lytle and Green were called the management contractors. It was their

duty under their contract to supervise the construction—supervise the other contractors in the construction of the highway, and to take care of the records and pay rolls and do the clerical work, and the office work, and in addition, of course, direct the other contractors, but the other contractors had separate and distinct contracts with the government, and those contracts were almost identical in terms with Lytle and Green's contracts, except for the type of work they were to do. They were all cost-plus and fixed fee contracts.

The Court: Well, were these contracts entered into directly with the government, or the Public Roads Administration?

Mr. Sager: Yes, they were.

The Court: And not with Lytle and Green?

Mr. Sager: That is correct. I do not think there is any dispute on that question.

Mr. Peterson: Under the principal contract, Your Honor, Lytle and Green Company were to negotiate these contracts with the unit price contractors and to have general—help and recruit labor, equipment, and to [11] have general supervision over them in the performance of the work, but each unit price contractor entered into a separate contract direct with the government as to his compensation, and then Lytle and Green would assign them to the various units, and these unit price contractors were all covered by the policy of insurance. They were named assureds in it.

The Court: Then, were these so-called unit contractors required under his contract with the gov-

ernment, to furnish a surety bond and public liability?

Mr. Peterson: So Your Honor may have it in mind——

Mr. Sager: I do not think there were surety bonds furnished in any of them, Your Honor, because it was a cost-plus and fixed fee contract, and the government was paying the cost on vouchers, or one way and another. I don't think their performance bond was required.

The Court: Well, was the insurance, or the premium involved here for insurance, the outgrowth of a requirement in the contract the government had made with the contractor, that he carry such insurance?

Mr. Sager: I believe that is true. If they did not require it, at least it permitted them to obtain it and authorized reimbursement for the premium.

The Court: And did these various sub-contractors have the same provision in their contract?

Mr. Sager: Whether they had it directly or indirectly——

The Court: What I have in mind is, was there a duplication of insurance? [12]

Mr. Sager: No, there is no duplication of insurance. This one policy covered all. There is no dispute between us on that.

Mr. Peterson: One policy covered all, and the provision in the principal contract is found on page 7, paragraph h, "Premium." This is the reimbursement provision:

"Premiums on such bonds and insurance policies

as the district engineer may approve or require as reasonably necessary for the protection of the government, or the project manager.”

That is the contract with Lytle and Green Company.

Now, the unit price contract—I have only one before me, but I understand they are all the same—contains this provision, page 6, paragraph 1:

“Premiums on the bond and insurance policies as the contract officer may require, and proof in writing in advance is necessary for the protection of the contractor, his employees, or the government.”

This policy, Your Honor, was, as I have stated, was obtained through bids of Lytle Company, as I understand, under the direction of the P.R.A., and the Hansen & Rowland bids being the lowest, Mr. MacDonald, whom I don't know, or his position, but I think Mr. Sager will agree that he was an authority so far as the Federal Works Administration was concerned, directed the Lytle and Green Company to obtain insurance and the insurance was obtained, and then submitted—a copy of the binder, as well as copies of the policies submitted to the P.R.A., when they [13] were delivered, and who made no objection to the same, and we will assume of course, in the absence of any objection, they were approved.

That, I think, is a statement of the situation, I think, isn't it, Mr. Sager?

Mr. Sager: Of course, I would not follow your assumption, but they were authorized, and bids



were received, and the policy was issued pursuant to the bids.

Mr. Peterson: Yes.

Mr. Sager: Yes. Now, there are two problems in this case, as it appears to me. The first is, whether or not an account has been stated, and I agree there is no affirmative defense of fraud and mistake as against their contention that is an account stated. If the Court finds and determines there is an account stated in this case by virtue of those two letters, a letter from Mr. Rice—then there is only one judgment to be entered and that is judgment for the amount they claim to be due.

It is the government's position that there is not an account stated, and while Your Honor indicated at a pre-trial conference here that you thought there was one, I want to call your attention to this, that subsequent to that hearing we filed an amended answer after obtaining leave of the Court to do so, setting up a set of circumstances and facts showing a period of negotiation between a representative of the Public Roads Administration and Mr. Northrup, who is here and will testify, and the home office of the insurer, attempting to negotiate an adjustment or settlement of this alleged premium; that [14] that period of negotiations began before this so-called account stated letter, and continued for well after, for a period well after that.

Now, I attempted at the time of the pre-trial conference to offer correspondence as showing that series of negotiations, and I believe it was Your

Honor's feeling that it was not proper at that time because of lack of proper pleading, so as a result of that we filed this amended answer in which we set up—I think it is probably set up affirmatively, this series of negotiations and conferences, leading to an adjustment of this premium, while this letter from Mr. Rice was written. It is my position, and I think the law is to that effect, that there is not an account stated except where there is a meeting of minds to a final conclusion as to the amount due, an acknowledgment—final acknowledgment that that is the amount due.

Now, obviously if they are negotiating on this thing and continuing to negotiate after the so-called letter constituting an account stated, it does not constitute a meeting of minds.

The Court: But, the negotiations were with the government or governmental agency, rather than with the party primarily liable on the insurance contract.

Mr. Sager: Yes, but we will show this and our affirmative answer pleads it, that the insurers, both the agent and Mr. Rowland, and the home office knew the type of contract under which the insured was working; that it was a cost-plus contract with the government; that all items of expense were reimbursable; that they [15] had to be approved by the government; that this agent of the P.R.A. who was negotiating on the adjustment had been recognized by both the agent here and the home office of the insurer as a representative of the government, and in that capacity also acting as the agent of the

insured, the contractors, for the purpose of negotiating this premium.

It is a fact, and the evidence will show that the original policy of insurance was not mailed to the insured—to the defendant companies, but was mailed to the Public Roads Administration. The copies of the policy were mailed to the insured. Now, that is part of the correspondence upon which I wanted to show at the time of the pre-trial conference, in other words, and the whole question of negotiation after the policy was issued. After it was cancelled, the whole negotiation was not between the insurer and the contractor, but was between Mr. Northrup, the representative of the P.R.A., and the insured—insurer, the insurance company, except for this letter that was—the sending of the statement—the bill, to Mr. Rice and the letter upon which they rely as constituting an account stated.

Well, now, so much for that. If the Court holds it is an account stated, there is nothing else to this case. If the Court holds there is not an account stated, then there is the further problem to consider. The policy fixes the premium and the rate of 85 cents per \$100.00, not upon the pay roll on the project, but upon the remuneration to employees of the insured. The insured are the contractors. The remuneration [16] of the employees of the contractors.

Now, the evidence will show that all of the men working on this job with the exception of—and there were probably twelve hundred of them during

this period of two and a half months when the policy was in force—all of them except perhaps fifteen, and those fifteen constituted the contractors themselves and in one or two instances an agent appointed by the contractor with the power of attorney where the contractor himself was not up there on the job—all other men on the job with the exception of those fifteen or so were put under Civil Service before they ever left their point of recruitment. Most of them came from Iowa and the Middle Western States. They were placed under Civil Service. They went through all the formalities of being appointed Civil Service appointees. They filled out the government forms and were finger-printed and given a medical examination, and were appointed under Civil Service, and that this entire pay roll, which was erroneously reported to the contractors as being the pay roll upon which the premium should be predicated, was the pay roll of these government employees, and they were paid by government checks, and it is the government's contention, that being under Civil Service, being paid by government checks, being directed in the details of the work by government employees—since the superintendents and the foremen and the straw bosses, every one except the actual contractor himself, were government employees—I mean, were Civil Service and paid by government check, that they were all government employees; that they were not employees of the [17] contractors, except for a few employees who were paid directly by the contractor and were re-

imbursed by the government, and I think there is no dispute between us as to the amount of that. It is some five thousand dollars. That amount we concede was pay roll remuneration of employees of the contractors, and upon that amount we recognize liability for a premium based upon that pay roll.

In addition to that the government's evidence will show that during the period involved here—the period from June 17th to September 1st or August 31st when the policy was cancelled, there were only two of these contractors who worked on the part of the road, the 155 miles of highway from Slana, Alaska, to the Canadian border, upon which this insurance contract is predicated. The insurance contract provides, and I called attention to this provision of the contract the other day, and this is not a regular part of the contract, but it is by an endorsement attached to the contract:

“It is agreed that the policy shall apply only to operations performed at, from, or in connection with all or any part or division of the construction of approximately 155 miles of highway from Slana, Alaska, to the Canadian line.”

The evidence will show that this 155 miles composed two so-called sections of the highway, sections 1 and 2, I believe they are; that—of course the highway contains many other sections—that the contract between these contractors and the government called for the construction of these two sections, 1 and 2, being approximately 155 miles

from the point Slana, Alaska, to the [18] Canadian border; that as a matter of fact, and under this insurance policy, it applies, accordingly, to this endorsement, to that portion of 155 miles.

The evidence will show that during the time, the policy covered only two of these contractors, who worked on those sections of the highway; that the rest of them were working on sections 3, I believe, and 4,—an entirely different part of the highway, not within the contract as written between the government and the contractors, and certainly not within the contract of insurance, and that if the Court does not follow us on our contention that none of these employees were employees of the contractors, but holds that they were employees upon which the premium should be based, that even so the premium should be figured only on the pay rolls of these two contractors who worked on that portion of the highway designated in the contract of insurance.

I think that is a fair statement of the government's position, Your Honor.

Mr. Peterson: I believe Your Honor has gotten away from a matter I wanted and intended to get before the Court, and I thought I would do it at this time because if the Court sustained my position counsel would have the noon hour to consider what he wishes to do. I think the only question here is whether or not under this answer the usual fraud, mistake, or accident is an issue. The burden of that—

The Court: Well, there are two very complicated problems presented in this case, and the first is this, this question of an account stated. After the pre-trial [19] hearing, where the Court has found there was an actual account stated by reason of the correspondence that passed, this amended answer was filed and the affirmative matter set up, but the answer made not on the theory they were answering to an account stated, but making an amended answer and affirmatively alleging a liability in a limited sum, but bringing in the feature that it was evidence to the Court from the very beginning existed in this case, and evidently has a number of other cases, and that is the interest of the government as a party. I still am of the impression, at least, that the government should intervene here if they want to save themselves from liability. If the government is actually a party in interest, and apparently from the statements made by counsel on both sides, they are, and want to save themselves from liability, they ought to intervene, and these people who assumed this liability, evidently on the theory that they could pass the responsibility on to the government on their cost-plus fixed fee contract, should not be permitted to hide behind that situation, but the whole facts should be made known.

Now, if this be a transaction entirely between the plaintiff here and the named defendants, I do not see that the statements made by you, Mr. Sager, would be any defense to their admitted liability.

If it is a contest for the purpose of ascertaining

whether the federal government, under its practice should be held liable, of course there is an entirely different situation presented, and then you do get into the issue as to whether the pay rolls submitted were [20] erroneously submitted by reason of carrying employees that were not on this work at all, and second, the question whether they were employees in fact, or were actually federal employees under Civil Service. The mere fact they were designated Civil Service would not have any—make them such conclusively.

Mr. Peterson: We are not proceeding——

The Court: And that is the difficulty that is presented here. I do not know why the practice—I am assuming, Mr. Sager, you are appearing in name only for these nominal defendants, and in fact, appearing for the government?

Mr. Sager: Well, you raised that question once before, Your Honor, and I am here appearing at the direction of the Attorney General for these defendants. The government is not a party to the suit, and I may say that it is my understanding that the government has to reimburse whatever amount was paid. The suit here is between two private parties.

The Court: Well, it is extremely difficult for this Court to arrive at a conclusion that it was ever intended on these cost-plus fixed fee contracts that the federal government should reimburse obligations there were fictitious or unessential or not actually required, and from the very defense that



you suggest here, you suggest a situation that falls within that general classification.

Mr. Sager: Well, there isn't any dispute that a policy of this type of insurance, or at least something very similar to it, was a proper expenditure for the [21] insured, these contractors. It is true, from the circumstances and the conditions up there, a third party public liability was practically—no hazards, no exposure to hazards. I mean, here are contractors up here in an isolated part of the world where there aren't any third parties to be injured, but presumably there may be—as a matter of fact, Mr. Peterson stated there wasn't any loss on this type of coverage from the time—not only during this period of coverage but during the period the next insurer was on. Nevertheless, there was some hazard, remote as it may be.

Now, it was a proper item of expense, proper protection for the contractors, and a proper item of expense for the government to assume, and the only question here from our standpoint is that under the terms of the policy itself, the premium is not—or the alleged premium of the insurer is not the premium charged under the terms of that policy.

The Court: I think your position would be very sound if you were before this Court as an intervenor, but the difficulty that the Court has here, is that the defendants named here, saw fit to go out and assume this liability, but that certainly should not make it of itself a federal liability.

Mr. Sager: Of course, they are suing the in-

sured, the contractor. If the Court holds he assumed this liability by virtue of this letter he wrote—holds that it is an account stated, then he is going to have to pay it, whether the government reimburses him or not, and the government is not appearing here merely to protect itself [22] from its liability under its contract, with the contractors. Perhaps it may be the administrator's office may determine this is not a reimbursable item, by reason of perhaps this letter from Mr. Rice, and if they do, it is going to be up to Lytle and Green to pay the premium without being reimbursed, subject of course to their right to sue the government for that premium as a reimbursable item, but we are not attempting merely to shield the government in this case. It is not, and the issue here is not whether the government has to reimburse Lytle and Green. The issue is whether or not under the policy this premium is the proper premium, and I think it is certainly proper to show——

The Court: Mr. Sager, I cannot conceive of the Attorney General directing you to appear in this case—and he can only direct you to appear officially,—he cannot direct you to appear as private counsel for Lytle and Green for any reason, other than for the purpose of protecting the government's interests in some way.

Mr. Sager: That is true, but that is on the assumption that the government is going to reimburse this premium.

The Court: Well, the Court is placed in a very unusual situation when the party primarily liable

assumes liability, based upon the assumption that it is a matter of little importance to them because the government in the end is going to pay it, and that appears to be the situation that we have here.

[23]

Mr. Sager: I do not know, of course, what the motive was for Mr. Rice writing this letter. I am of the opinion as I urged on Your Honor before, that the letter he writes there does not constitute a final unequivocal agreement to pay this premium. It is merely a statement of his opinion that the thing is long overdue and it should have been paid, but you recall that in the latter he says that he is taking it up, or sending some man out to Seattle to take it up with the P.R.A.

Now, obviously that throws some color on the intention of the letter.

The Court: Of course, the Court did not interpret the taking up, as you do evidently. I interpret that language to be that he was taking up the matter of making the payment, not the matter of adjusting the account.

Mr. Sager: You consider that, in the light of during this same time and during the whole time for months afterwards, the principal here, the insurance company's home office was carrying on a series of negotiations both by correspondence and in writing with the agent of the government, looking to an adjustment of this premium, and—

The Court: Well, unfortunately your pleadings do not bring those things into issue here. Your

affirmative defense does not bring that—does not make that an issue.

Mr. Sager: I think so, it alleges——

The Court: It is a mere denial. [24]

Mr. Peterson: Your Honor, we are willing to go along with the trial and if the Court directs counsel, he can amend during the noon time or any convenient time and we can go along with the case. I raised the matter so there would not be any unnecessary delay. The burden is upon him to prove any of those defenses he may elect to, and adopt. I think this action is clearly one—clearly between the plaintiff and Lytle and Green.

The Court: Unfortunately it appears that has become one of the major issues, not on the face of the pleadings, but on the face of the appearances. Lytle and Green apparently have little interest in the outcome of this case, and are apparently indifferent as to what happens.

I wish you would give consideration to the suggestion, Mr. Sager, the Court has made and if you desire to submit an amendment to your pleadings, the Court will hear you, but meantime, you may proceed with your proof and then at the noon hour you can give further consideration to this.

Mr. Peterson: Will you take the stand, please, Mr. Rowland? [25]

I. C. ROWLAND,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your name is I. C. Rowland? A. Yes.

Q. Mr. Rowland, what position if any do you occupy with the plaintiff, Hansen & Rowland Company? A. I am secretary.

Q. And what position did you occupy in the summer of 1942? A. The same position.

Q. What is the business of Hansen & Rowland Company? A. Insurance.

Q. You maintain offices where?

A. Seattle, Tacoma, Portland, and San Francisco, Juneau, Alaska.

Q. Hansen & Rowland Company is a corporation? A. It is.

Mr. Peterson: Your Honor, our auditor overlooked bringing in the receipts showing the payment of annual license fee.

The Court: I do not think there will be any issue on that, is there, Mr. Sager?

Mr. Peterson: We will bring them in at 2:00 o'clock. I think we have to prove it, Your Honor, in order to maintain an action.

The Court: You would not, if it was stipulated they have paid it. [26]

Mr. Sager: I do not raise any question about that. They are doing business here, I assume they paid their license fees.

(Testimony of I. C. Rowland.)

Mr. Peterson: Very well, it is so understood.

Q. Now, I will ask you whether or not you know the Phoenix Indemnity Company of New York?

A. I do.

Q. What relation did you occupy with respect to—your company with respect to that company in the summer of 1942?

A. Hansen & Rowland, Incorporated, and Hansen & Rowland, Inc. of Alaska, were their agents.

Q. Do you know if you had any business transactions with Lytle Company and Green Construction Company in 1942?

A. I did not hear the question.

Q. Did you have any business relations with the defendants C. F. Lytle Company and Green Construction Company in 1942?      A. Yes.

Q. What, briefly, was that transaction?

A. We were asked to submit a written quotation for public liability and property damage insurance, including automobiles, for all work in connection with, and arising out of their contract with the United States Government for the construction of a section of the Alaska Highway, between Slana and the Canadian border, the policy to include and insure all associated or affiliated, or sub-contractors.

Q. Just a minute, was the policy issued finally in accordance with the request?      A. It was.

Mr. Peterson: We will introduce that so it [27] wont be necessary to go into the other matters, unless the Court desires it.

(Testimony of I. C. Rowland.)

Mr. Sager, you have been requested to produce the bids for this insurance. I understand they are not here. It is by the order of the Court that the defendant produce them.

Mr. Sager: If he had them, and I understand he does not have them.

Mr. Peterson: They cannot be produced?

Mr. Sager: That is right. I would not say they can't be. He does not have them.

Q. Mr. Rowland, I submit to you—is that Plaintiff's Exhibit 1, it is marked up there?

The Court: Yes.

Q. 1, and ask you whether or not that is a copy of an original bid submitted by you to Lytle and Company in connection with this insurance?

A. It is.

Q. Was it delivered on or about the date indicated? A. It was delivered on that date.

Mr. Peterson: We offer the Exhibit 1 in evidence.

Mr. Sager: I object to it, Your Honor, on account of the—on the ground that the subsequent contract that was entered into, and all these preliminary negotiations leading up to it, are incorporated in the final contract. The final contract is the thing in issue here, and this is immaterial.

The Court: Objection will be overruled and exception allowed. It may be admitted. [28]

(Whereupon, bid for insurance referred to was then received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 1

June 12, 1942

C. F. Lytle Co., and Associates,  
L. C. Smith Building,  
Seattle, Washington.

Attention: Mr. Rice

Re: Public Liability and Property Damage Insurance.

Gentlemen:

We are pleased to quote on Public Liability and Property Damage Insurance in connection with the operations of your Company and Associates arising out of the construction of the Alaska Highway all within the territory of Alaska from Slana to the Canadian border.

Our contract will insure all operations including the operations of automobile trucks, tractors, trailers and passenger cars wheresoever operated in the Territory of Alaska, to and from and within the United States in connection with the construction of the above mentioned highway.

Limits of Liability to be \$50,000 any one person injured in any one accident, and \$100,000 for any number of persons injured in any one accident, and Property Damage of \$5,000 arising out of any one occurrence, and an aggregate limit of \$25,000 for all occurrences during the policy year. Property Damage limit on automobiles and trucks is \$5,000 any one claim or in the aggregate.



(Testimony of I. C. Rowland.)

The rate to be computed at 85c Per \$100.00 of payroll of all employees engaged in connection with the project.

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

By

I. C. ROWLAND

Secretary

ICR.1c

[In pencil]: Reinstate.

---

Mr. Peterson: It is stipulated and agreed between plaintiff and defendant that bids from two other underwriters were submitted with respect to furnishing this insurance coverage.

Mr. Sager: We will agree to that, Your Honor.

The Court: Very well.

Q. Mr. Rowland, I will ask you whether or not, following the submission of the bid, you received a request from Mr. Rice to furnish the insurance?

A. I did.

Q. Mr. Rowland, I will ask you whether or not Mr. Rice, in connection with his request for the insurance, gave you any information with respect to a request that he obtain the insurance?

A. At the time that he gave me the order, he told me that he had received instructions to buy it from some gentleman in Washington.

(Testimony of I. C. Rowland.)

Q. Those instructions were—in what form did the instructions come?

A. He gave me a copy of a telegram, or he showed me a copy of the telegram and we copied it.

Q. I show you now Identification No. 2, and ask you if that is the telegram you refer to?

A. Yes.

Q. Do you know who Mr. MacDonald was at that time?      A. No, I don't.

Mr. Sager: I will agree this was a telegram [29] directed to Mr. Rice by Mr. MacDonald, and I don't know——

The Court: Bureau of Public Roads.

Mr. Sager: MacDonald was a man in authority of the Public——

The Court: MacDonald was the chief of the Bureau of Public Roads.

Mr. Sager: I will agree this is a copy of the telegram he sent to Mr. Rice.

Mr. Peterson: We offer it.

The Court: It will be received in evidence.

(Whereupon, telegram referred to was then received in evidence and marked Plaintiff's Exhibit No. 2.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 2

(Copy)

WESTERN UNION

June 10 1942

PM 1 34

CA 407 51 Govt-Washington DC

2 07 P

To: H L Rice

Care C F Lytle Co Sioux City Iowa—

Pending Final Information From Insurance Section of Federal Works Agency You Are Authorized to Secure Such Public Liability and Property Damage Insurance as Is Necessary to Protect the Management and Construction Contractors It Should Be Understood That These May Be Short Term Policies to Be Cancelled When Detailed Information Is Available.

MacDONALD

---

Mr. Peterson: Your Honor, I have just exhibited to Mr. Sager the original receipt of the Secretary of State for the current license fee of Hansen & Rowland.

Q. I will ask you when—about when this request for insurance coverage was made, Mr. Rowland?

A. You mean, when we were requested to bid on it?

Q. Yes.

A. Just a day or two, or a few days prior to the

(Testimony of I. C. Rowland.)

effective date of the insurance. I don't remember what that date was.

Q. Yes. I will ask you whether or not in the meantime you provided Mr. Rice and his companies with a temporary coverage until the policy could be prepared?

A. Yes, immediately following the receipt of the order from Mr. Rice, I prepared a regular form binder.

Mr. Peterson: We offer Plaintiff's Exhibit [30] No. 3, the binder, in evidence. That is a correct copy.

Mr. Sager: I haven't any objection.

Mr. Peterson: The Exhibit No. 3 was prepared on the date of June 17th.

Q. I will ask you whether or not it was delivered on or about that date?

A. It was delivered on that date.

(Whereupon, insurance binder form referred to was then received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 3

(Copy)

Hansen & Rowland Inc

General Agents

Tacoma - Seattle - Portland

Surety Bonds General Insurance

Tacoma, Washington

H. T. Hansen, Pres.

I. C. Rowland, Secy.

Seattle, Washington

June 17, 1942.

This Communication if Signed as Agent or Agents Shall Bind in Such Capacity Only.

Please Address All Communications to Hansen & Rowland Inc., Not to Individuals.

C. F. Lytle Company, and  
Green Construction Company,  
Seattle, Washington.

Re: Public Liability and Property Damage  
Insurance—Alaska Road

Gentlemen:

Confirming conversation with your Mr. Rice this morning please be advised that effective from 12:01 A.M. June 17, 1942 we have bound in Phoenix Indemnity Co. of 55 Fifth Avenue, New York City, Public Liability and Property Damage insurance as follows:

(Testimony of I. C. Rowland.)

### ASSURED

C. F. Lytle Company of Sioux City, Iowa,  
and/or Green Construction Company and/or  
Frank & Orville Eblen,  
Ira Van Buskirk,  
Gus Osterman,  
E. M. Dusenbergh, Inc.,  
Sears Construction Co.,  
J. W. Scothorn Construction Co.,  
Frank Eblen & Hilding Ekdahl,  
V. L. Lundeen, Inc.,  
Wm. Horrabin Contracting Co.,  
Western Engineering Co.,  
L. Peterson,  
Weldon Brothers,  
Duvall & McKinney,  
J. Leo Hoak,

and/or any other associated or affiliated contractors  
who may be employed by or associated with C. F.  
Lytle Company and Green Construction Company  
in the performance of all or any part or division of  
the construction of approximately 155 miles of  
Alaska Highway from Slana to Canadian Line.

### LIMITS OF INSURORS' LIABILITY:

For Public Liability for all claims arising out  
of bodily injuries or death of one person from any  
one accident shall be limited to \$50,000.00, and sub-  
ject to that limit for each person, the Insurers'  
total Liability for all claims arising out of bodily

(Testimony of I. C. Rowland.)

injuries to or the death of more than one person from any one accident is limited to \$100,000.00.

For Property Damage other than Automobile on account of any accident resulting in damage to or destruction of property of others is limited to \$5,000.00, and, subject to that limit for each accident, the Insurers' total aggregate liability on account of all accidents occurring while this insurance is in force is limited to \$25,000.00.

Property Damage—Automobiles on account of any accident resulting in damage to or destruction of property of others is limited to \$5,000.00, and subject to that limit for each accident, the Insurers' total aggregate liability on account of all accidents occurring while this insurance is in force is limited to \$25,000.00.

#### SCOPE OF INSURANCE:

It is understood and agreed by the Insurer that the protection given hereunder is comprehensive Public Liability and Property Damage and covers all operations of the Assureds in Alaska or elsewhere in connection with the project or having to do with the construction of said road undertaken by the Assureds including claims arising out of the operation of automobiles, trucks, tractors, trailers and all and various types of equipment.

#### PREMIUM:

To be computed at the rate of Eighty Five Cents (\$0.85) per each \$100.00 of payroll which payroll

(Testimony of I. C. Rowland.)

shall be declared monthly to Hansen & Rowland, Inc., of Alaska, at 201 Washington Building, Tacoma, Washington, and premium then paid computed as above.

The assureds agree to deposit as an advance premium the sum of \$5,000.00 which is to be credited or adjusted on the final payroll report under said insurance.

This binder to remain in full force and effect as evidence of said insurance until policy is delivered when liability hereunder shall terminate unless previously canceled.

Very truly yours,

PHOENIX INDEMNITY CO.

(of New York)

By HANSEN & ROWLAND, INC.  
of Alaska

General Agents

By I. C. ROWLAND,  
I. C. Rowland,  
Secretary

ICR.1c

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Q. And ask you also whether or not in this connection the copies were furnished to the Bureau of Public Roads in accordance with the policy conditions?      A. They were.

Q. At the time?      A. Yes.

Q. They were delivered to whom?

A. I did not personally deliver those, but they were delivered to the Seattle office of the P. R. A. in the Hoge Building.



(Testimony of I. C. Rowland.)

Q. What individual?

Mr. Sager: I object. If he did not do it himself, obviously——

Mr. Peterson: You will agree they were delivered to Mr. Rice?

Mr. Sager: I don't know about the binder.

Mr. Peterson: Mr. Miller will be here this afternoon, if there is any question about it. All right. We offer Exhibit No. 3 in evidence.

The Court: Any objection, Mr. Sager? [31]

Mr. Sager: No, that is No. 3?

Mr. Peterson: Yes, the binder.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

Mr. Peterson: Now, Your Honor, in this case we made a request for admission, among other things, an admission as to the copy of the original policy, but it is photostated, Your Honor probably discovered it in the file, and it is difficult to read. I would like to, if I may, substitute this face copy.

Mr. Sager: I haven't any objection. You will put that in as an exhibit?

Mr. Peterson: Yes. Under the admission heretofore made, pursuant to our request for admission pursuant to Court rules, we now offer Plaintiff's Exhibit No. 4, a copy of the policy delivered to the defendants.

Mr. Sager: We have no objection.

The Court: It will be admitted in evidence.

(Whereupon, copy of insurance policy referred to was then received in evidence and marked Plaintiff's Exhibit No. 4.)



FORM 4700-COMPREHENSIVE  
LIABILITY POLICY-CLP

# PHOENIX

No. CLP 1750

## INDEMNITY



## COMPANY

HOME OFFICE

NEW YORK

No. 556

V. 1000000

### DECLARATIONS

PLAINTIFF EXHIBIT 4

Item 1. Name of insured

See Endorsement #1

SEP 6 1944

order

Address

Fairbanks, Alaska

(City)

(Street)

(Town)

(County)

(State)

Locations of all premises owned, rented or controlled by named insured All operations performed at  
from or in connection with the construction of approximately 155 mile  
Alaska Highway from Glenn, Alaska to Canadian line

Interest of named insured in such premises

Not Applicable

Part occupied by named insured

As may be necessary

The business of the named insured is

Contractors

Item 2. Policy Period: From

June 17th, 1942

to June 17th, 1943

12:01 A.M., standard time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein subject to all of the terms of this policy having reference thereto.

Coverages	Limits of Liability		Advance Premiums
A—Bodily Injury Liability	\$ 50,000	each person	\$
	\$100,000	each accident	
	\$Not Covered aggregate products		
B—Automobile Property Damage Liability	\$ 5,000	each accident	\$
C—Property Damage Liability Other Than Automobile	\$ 5,000	each accident	\$
	\$ 25,000	aggregate operations	
	\$ 25,000	aggregate protective	
	\$Not Covered aggregate products		
	\$ 25,000	aggregate contractual	

Deposit  
Total ~~Advance~~ Premium \$ 5,000.00

If Policy Period more than one year: Gross Premium \$ Discount \$ Net Premium \$

Premium is payable: On effective date of Policy \$ 1st Anniversary \$ 2d Anniversary \$

ATTACH SCHEDULES AND ENDORSEMENTS HERE

Item 4. No insurer has canceled any similar insurance issued to the named insured, nor declined to issue such insurance, during the past year, except as herein stated: Not Stated

Item 5. The schedules disclose all hazards insured hereunder known to exist at the effective date of this policy, except as herein stated: Not Applicable

Item 7. The schedules contain a complete list of all automobiles and trailers owned by the named insured at the effective date of this policy and the purposes of use thereof, except as herein stated: Not Applicable

Item 8. The schedules contain a complete list of all persons within the definition of Class 1 persons, including a designation of each such person using a non-owned trailer, at the effective date of this policy, except as herein stated: Not Applicable

Countersigned at Tacoma, Washington

this 17 day of July

1942

HANSEN & ROWLAND, INC. OF ALASKA  
By S/ I.C. Rowland Secy-Treas.

Authorized Representative



# PHOENIX INDEMNITY COMPANY

(A capital stock insurance company, herein called the company)

Does hereby agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

## INSURING AGREEMENTS

### I. Coverage A—Bodily Injury Liability.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons and caused by accident.

### Coverage B—Automobile Property Damage Liability.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

### Coverage C—Property Damage Liability Other Than Automobile.

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under contract as defined herein, for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

### II. Defense, Settlement, Supplementary Payments.

It is further agreed that as respects insurance afforded by this policy the company shall (a) defend in his name and behalf any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company; (b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and expenses incurred by the insured, in the event of bodily injury, sickness or disease, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The company agrees to pay the amounts incurred under

divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

### III. Definition of "Insured."

The unqualified word "insured" wherever used includes not only the named insured but also: (1) under coverages A and C any partner, executive officer or director thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use, including loading or unloading, of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining; and (2) under coverages A and B, any person while using any owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided that actual use is with the permission of the named insured, and also any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The provisions of division (2) of this paragraph do not apply: (a) to any person or organization with respect to bodily injury to or sickness, disease or death of any person who is a named insured; (b) to any person or organization with respect to any trailer while used with any automobile not covered by this insurance in the business of the named insured; (c) to any person or organization or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof; (d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or sickness, disease or death of another employee of the same insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such insured; (e) with respect to any hired automobile, to the owner thereof or any employee of such owner; (f) with respect to any non-owned automobile, to any executive officer if such automobile is owned in full or in part by him or a member of his household; (g) to any person or organization with respect to the use of any owned automobile or hired automobile as a taxicab, public bus, or public or private livery conveyance.

### IV. Policy Period, Territory.

This policy applies only to accidents which occur during the policy period within the United States of America, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during the policy period while the automobile is on a vessel between ports within said territory.

## EXCLUSIONS

### This policy does not apply:

- under coverages A and B, to the use of any owned automobile or hired automobile as a taxicab, public bus, public or private livery conveyance or in the business of trucking for others, or beyond the limitations of restricted use endorsement, unless notice thereof is given to the company within ten days after commencement of such use;
- under coverages A and B, to any owned automobile or hired automobile while operated (1) by any person under the minimum age required to obtain a license to operate a private passenger automobile in the state, federal district or territory, or province in which the automobile is registered or in which the accident occurs, whichever is lower, or (2) by any person under the age of fourteen years;
- under coverages A and C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) watercraft while away from premises owned, rented or controlled by the named insured, or (2) aircraft;
- to liability assumed by the insured under any contract or agreement not defined herein;

(e) under coverage A, except with respect to liability assumed under a contract covered by this policy, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the business, other than domestic employment, of the insured, or to any obligation for which the insured may be held liable under any workmen's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of, or transported by the insured.

(g) under coverage C, except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining;

(h) under coverage C, to injury to or destruction of (1) property owned, occupied or used by or rented to or, except with respect to the use of elevators or escalators, in the care, custody or control of the insured, or (2) any goods or products manufactured, sold, handled or distributed by the named insured or work completed by or for the named insured, out of which the accident arises.

## CONDITIONS

- Premium.** The premium bases and rates for the hazards described in the declarations are stated therein. Premium bases and rates for hazards not so described are those applicable in accordance with the manuals in use by the company.

The premium reduction percentage determined in accordance with the premium reduction table forming a part of this policy, including on a pro rata basis each owned automobile insured hereunder for less than the policy period, is applicable to the premium for each owned automobile insured hereunder.

Premium Reduction Table		
Number of Licensed Owned Automobiles, Exclusive of Trailers		Percentage Reduction
1st	5	0%
Next	15	10%
Next	30	15%
Next	50	20%
All over	100	25%
An average percentage reduction applicable to the premiums for all owned automobiles insured hereunder is to be computed in accordance with this table.		

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plane, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

When used as a premium basis: (1) the word "remuneration" shall mean the entire remuneration earned during the policy period by all employees of the named insured, other than the named insured, and chauffeurs, subject to each executive officer to a maximum and a minimum remuneration of \$100 and \$30 per week, and the remuneration of each proprietor at a fixed amount of \$2,000 per annum; (2) the word "receipts" shall mean the gross amount of money, including taxes, charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipt basis; (3) the word "cost" shall mean the total cost of all operations performed for the named insured during the policy period by independent contractors on each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured; (4) the word "sales" shall mean the gross amount of money, including taxes, charged for all goods and products sold or distributed by the named insured during the policy period; (5) the words "cost of hire" shall mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles; (6) the words "Class 1 persons" shall mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers of the named insured compensated for the use of automobiles by the named insured, terms of employment or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured; (7) the words "Class 2 employees" shall mean all employees, including officers, of the named insured, not included in Class 1 persons.

The named insured shall maintain for each hazard



records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

2. **Inspection and Audit.** The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within one year after the final termination of this policy, as far as they relate to the premium basis or the subject matter of this insurance.
3. **Definitions.** (a) **Contract.** The word "contract" shall mean a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.

(b) **Automobiles.** The word "automobile" shall mean a land motor vehicle, trailer or semitrailer, provided that tractors not designed for the hauling or carrying of materials or equipment and other self-propelled contractors' equipment not designed for the carrying of persons, materials or equipment shall not be deemed to be automobiles; and the word "trailer" shall include semitrailer.

"Owned automobile" shall mean an automobile owned in full or in part by the named insured.

"Hired automobile" shall mean an automobile used under contract in behalf of the named insured provided such automobile is not owned in full or in part by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile.

"Non-owned automobile" shall mean any other automobile.

The terms of this policy shall apply separately to each automobile insured hereunder but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

(c) **Purposes of Use.** The term "pleasure and business" is defined as personal, pleasure, family and business use. The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. Use of the automobile for the purposes stated includes the loading and unloading thereof.

(d) **Assault and Battery.** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

4. **Elevator Interlocks and Car Contacts.** The named insured agrees to maintain in effect during the policy period such hoistway door interlocks and car gate or car door contacts or interlocks as are described in the declarations and agrees further to use due care in maintaining the efficiency of such devices during the policy period.
5. **Limits of Liability—Coverage A.** The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident. If goods or products from one prepared or acquired at shall produce, after the named insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the named insured, bodily injury to or sickness, disease or death of more than one person, all bodily injuries, sicknesses, diseases and deaths proceeding from such common cause shall be considered as arising out of one accident.
6. **Limits of Liability—Aggregate Products—Coverages A and C.** The limit of bodily injury liability stated in the declarations as "aggregate products" is the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, caused by the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the named insured, or caused by operations, other than pick-up and delivery and the existence of tools, uninstalled equipment and abandoned or unused materials, when the accident occurs away from premises owned, rented or controlled by the named insured and after the named insured has relinquished possession of such goods or products to others or after the operations have been completed or abandoned at the place of occurrence of the accident. The limit of property damage liability stated in the declarations as "aggregate products" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused as aforesaid.
7. **Limits of Liability—Coverage C.** The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the handling or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by operations rated upon a cost premium basis.

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

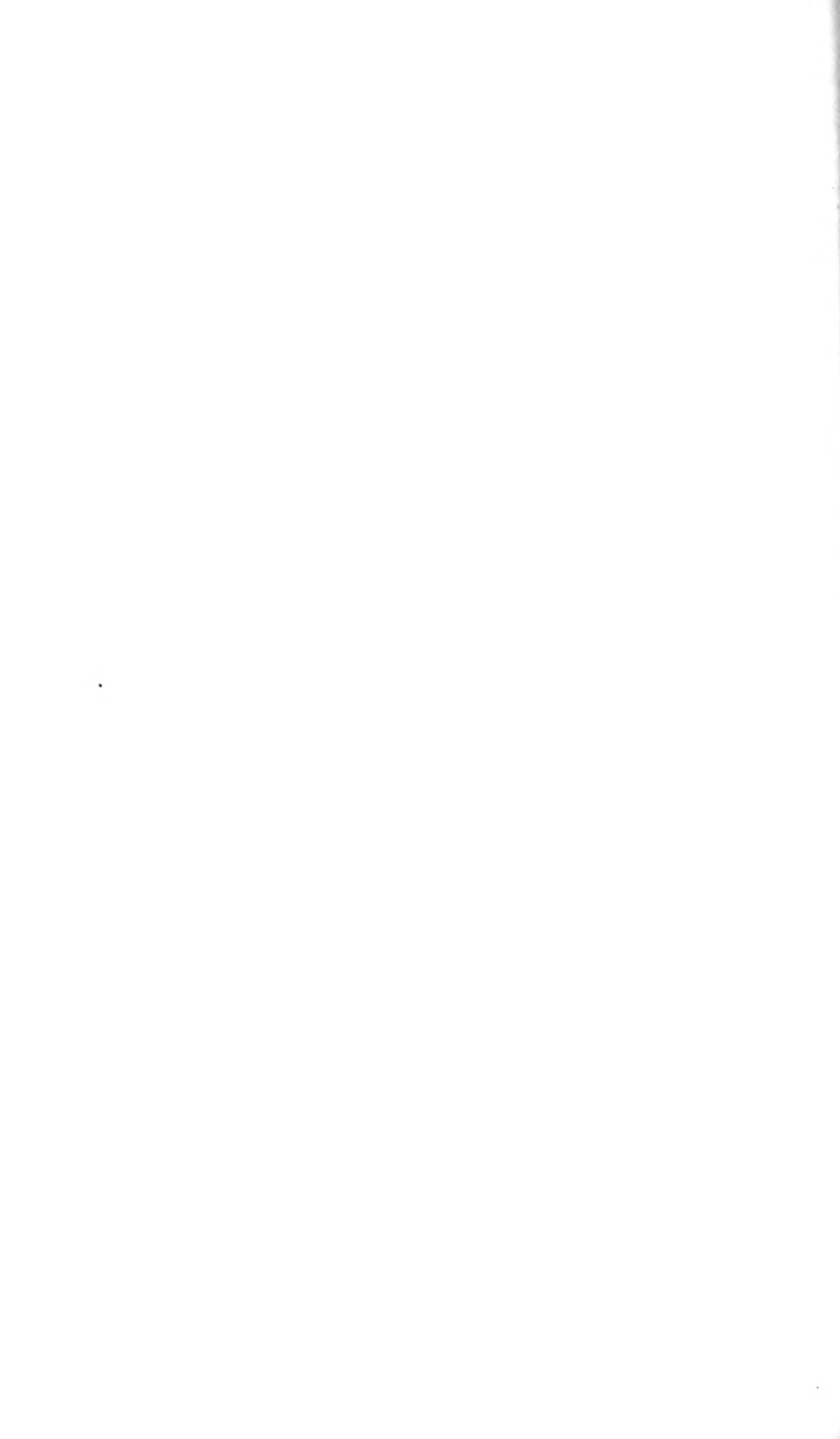
These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

8. **Limits of Liability.** The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.
9. **Financial Responsibility Laws—Coverages A and B.** Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in the excess of the limit of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.
10. **Notice of Accident.** Upon the occurrence of an accident written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.
11. **Notice of Claim or Suit.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.
12. **Assistance and Cooperation of the Insured.** The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits; and the company shall reimburse the insured for expenses, other than loss of earnings, incurred at the company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.
13. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured or after actual trial by the agreement of the insured, the claimant, and the company.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

14. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, that the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under this policy applicable with respect to such automobile or otherwise.
15. **Subrogation.** In the event of any payment under this policy the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.
16. **Changes.** No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by an endorsement in writing in the form hereof, signed by the President of the company.
17. **Assignment.** No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Paragraph 11, any person having proper temporary custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.
18. **Cancellation.** This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancellation shall be effective. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof





of notice and the insurance under this policy shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation.

19. **Declarations.** By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, the Phoenix Indemnity Company has caused this policy to be signed by its President, but this policy shall not bind the company unless countersigned on the declarations page by a duly authorized representative of the company.

No. 1130  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
**FILED**  
MAR 30 1945

**PAUL P. O'BRIEN**  
CLERK

**SPECIMEN**

**PHENIX**  
**INDEMNITY COMPANY**  
NEW YORK, N. Y.

**J. M. HAINES**  
PRESIDENT

**COMPREHENSIVE**  
**LIABILITY POLICY**  
Policy No. CLP 1750

**PHENIX**  
**INDEMNITY COMPANY**  
25 FIFTH AVENUE, NEW YORK, N. Y.



ISSUED TO

**C.T. Lytle Company of Sioux**  
**City, Iowa, etal**

Expires **June 17th,** 1945

**READ YOUR POLICY**

**HARMON & BORDLAND, INC. OF ALABAMA**  
**201 WASHINGTON BUILDING,**  
**FACOMA, WASHINGTON.**  
**SPECIMEN**

Form 6000 Form CLP 1750 11-44



(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

### PREMIUM ADJUSTMENT ENDORSEMENT

The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.

It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.

This endorsement is to take effect as of the 17th day of June, 1942 at twelve and one minute o'clock A. M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but this endorsement shall not

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)  
take effect unless countersigned by a duly authorized  
representative of the Company.

Countersigned:

HANSEN & ROWLAND, INC.  
OF ALASKA

By S/ I. C. ROWLAND

Representative.

[Illegible]

President.

Comprehensive General Liability Policy  
Endorsement  
Exclusion of Products Liability

It is agreed that the policy does not apply

(1) to the handling or use of, the existence of  
any condition in or a warranty of goods or products  
manufactured, sold, handled or distributed by the  
named insured, other than equipment rented to or  
located for use of others but not sold, if the accident  
occurs after the insured has relinquished possession  
thereof to others and away from premises owned,  
rented or controlled by the insured or on premises  
for which the classification is stated in the declara-  
tions as subject to this exclusion;

(2) to operations, other than pick-up and de-  
livery and the existence of tools, uninstalled equip-  
ment and abandoned or unused materials, if the  
accident occurs after such operations have been  
completed or abandoned at the place of occurrence

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

thereof and away from premises owned, rented or controlled by the insured.

This endorsement forms a part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal

Countersigned by

HANSEN & ROWLAND, INC.  
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative.

[Illegible]

President.

### ENDORSEMENT #1

Item 1—

Name of Insureds:

C. F. Lytle Company of Sioux City, Iowa, and/or Green Construction Company and/or Frank & Orville Eblen, Ira Van Buskirk, Gus Osterman, E. M. Dusenbergl, Inc., Sears Construction Co., J. W. Scothorn Construction Co., Frank Eblen & Hilding Endahl, V L. Lundeen, Inc., Wm. Horrabin Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duvall & McKinney, J. Leo Hoan, and/or any other associated or affiliated contractors who may be employed by or associated with C. F. Lytle Company and Green Construction Company in the performance of all or any

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska, to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.  
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

ENDORSEMENT #2

It is agreed that the Policy shall apply only to operations performed, from or in connection with

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.

OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

REVISED

ENDORSEMENT #2

It is agreed that the Policy shall apply only to operations performed at, from or in connection with all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to Canadian Line.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01, standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.  
OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative



(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

ENDORSEMENT #3

The undermentioned Policy is issued by the Company and accepted by the insured with the understanding and agreement that:

1. C. F. Lytle Company of Sioux City, Iowa and/or Green Construction Company shall be the principal named insureds under said Policy, and all other interests named in and covered by said Policy shall be considered as additional named insureds. For the purposes of cancellation as expressed in condition 18 of said Policy, The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall be considered as the agent of the additional named insureds, and The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall assume responsibility for the maintenance of such records as are necessary for the computation of earned premium on said Policy, and for the payment of such earned premium to the Company. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor. For the purposes of cancellation, the

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

address of the named insured shall also be Sioux City, Iowa, in addition to Fairbanks, Alaska.

2. The C. F. Lytle Company of Sioux City, Iowa and/or Green Construction Company will furnish to the Company, the name of any associated or affiliated contractor who may be employed by or associated with them in connection with the operations covered by the Policy, within 30 days after the effective date such associated or affiliated contractor undertakes operations.

3. Condition 1. Premium, in the undermentioned Policy, is eliminated and the following substituted therefor:

1. Premium. The premium stated in the Policy is an estimated premium only. Upon termination of the Policy, the earned premium shall be computed at a rate of 85% per 100 of remuneration of all named insureds. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the Company; if less, the Company shall return to the named insured the unearned portion paid by such insured.

The word "remuneration" shall mean the entire remuneration earned during the Policy period by all employees of each and every named insured, subject, with respect to each executive officer of a corporate named insured, to a maximum and a minimum remuneration of One Hundred Dollars (\$100.00) and Thirty Dollars (\$30.00) per week respectively,

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

and to the inclusion, for each individual insured or co-partner of a co-partnership insured, of a fixed amount of Two Thousand Dollars (\$2000.00) per annum. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.

4. Regardless of anything herein to the contrary it is understood and agreed that the Company waives any right of subrogation against the United States of America which might arise by reason of any payment under this Policy.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, et al but the same shall not be

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)  
binding unless countersigned by a duly authorized  
agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th  
day of July 1942.

HANSEN & ROWLAND, INC.

OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative.

#### ENDORSEMENT #4

Cancellation—Cancellation by the Company shall not be effective unless a copy of the Notice of Cancellation is mailed to Insurance Section, Office of the Administrator, Federal Works Agency, Washington, D. C., and to J. S. Bright, District Engineer, Federal Works Agency, Public Roads Administration, 303 Hoge Building, Seattle, Washington, on the same day that Notice of Cancellation is mailed or delivered to the employer (named assured), and in the event of cancellation by the employer (named assured) the Company will as soon as practical mail notice thereof to the officer or officers named in this paragraph.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 4—(Continued)

This endorsement is to take effect as of the 17th day of June 1942, at 12:01 A.M., standard time, at the place where this endorsement has been countersigned.

Attached to and forming part of Policy No. CLP-1750 issued by the Phoenix Indemnity Company, New York, N. Y., to C. F. Lytle Company of Sioux City, Iowa, etal but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

[Illegible]

President.

Countersigned at Tacoma, Washington this 17th day of July 1942.

HANSEN & ROWLAND, INC.

OF ALASKA

By S/ I. C. ROWLAND

Secy-Treas.

Authorized Representative

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Q. Mr. Rowland, I show you now Plaintiff's Exhibit No. 5, purporting to be a copy of a statement under date of July 29th, 1942, and ask you whether or not you submitted such a statement to the defendants?      A. I did.

Mr. Peterson: You are unable, I understand, to produce the original at this time, Mr. Sager?

Mr. Sager: I have not been requested, Mr. Peterson, until now. [32]

(Testimony of I. C. Rowland.)

Mr. Peterson: We offer the Exhibit No. 5 in evidence, Your Honor, a statement of the deposit premium, \$5000.00.

The Court: Any objection, Mr. Sager?

Mr. Sager: No, Your Honor.

The Court: It will be admitted in evidence.

(Whereupon, statement of deposit referred to was then received in evidence and marked Plaintiff's Exhibit No. 5.)

### PLAINTIFF'S EXHIBIT No. 5

Tacoma, Washington, July 29, 1942

M C. F. Lytle Company and/or Green Construction Company  
Sioux City, Iowa

To HANSEN & ROWLAND, INC., Dr.  
OF ALASKA

General Insurance—Surety Bonds  
201 Washington Building  
Tacoma, Washington  
MAin 1161

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Re: Phoenix Indemnity Company Policy CLP-1750  
Public Liability and Property Damage insurance, for  
C. F. Lytle Co. &/or Green Construction Co., et al.,  
in connection with construction of approximately 155  
miles of Alaska Highway from Slana, Alaska, to  
Canadian border.

Bodily Injury Liability \$50,000 limit each person  
\$100,000 limit each accident

Automobile Property Damage Liability  
\$5,000 limit each accident

Property Damage other than Automobile  
\$5,000 limit each accident  
\$25,000 aggregate limit

Protective Liability \$25,000 aggregate limit

Contractual Liability \$25,000 aggregate limit

Based on rate of 85c per each \$100.00 per of payroll.

Deposit Premium \$5,000.00

(Testimony of I. C. Rowland.)

This is to Certify:

(1) That the amount stated herein is a correct premium charge for the insurance afforded by the policy.

(2) That the computation is based upon a period not in excess of the time elapsed between the date of the commencement of work and the date of the completion thereof.

(3) That only the payrolls for the work done under the contractor's obligation to the Government have been considered in the computation of the premium.

(4) That the premium covers no insurance extending to any operation or location not a part of the work performed by the contractor under his contract with the Government in connection with the construction of Alaska Highway from Slana, Alaska, to the Canadian Border.

The above bill is correct and just; and payment therefore has not been received.

HANSEN & ROWLAND INC., OF ALASKA  
General Agents

By I. C. ROWLAND  
I. C. Rowland, Secretary-Treasurer

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Q. I show you now Plaintiff's Exhibit No. 6, Mr. Rowland, and ask you from whom that was received by your office?

A. This was received from Lytle and Green's Alaska office.

Q. And what date does it bear?

A. Dated August 22nd, 1942.

Q. I will ask you if that was in connection with this policy of insurance which has just been introduced in evidence? A. It was.

Mr. Peterson: We offer Exhibit No. 6 in evidence.

The Court: Any objection?

(Testimony of I. C. Rowland.)

Mr. Peterson: It is admitted, I think, Your Honor, under the admissions.

The Court: It will be admitted in evidence.

Mr. Sager: What is the date of that?

Mr. Peterson: What is the date, please—August the 22nd.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 6.) [33]

#### PLAINTIFF'S EXHIBIT NO. 6

C. F. LYTLE COMPANY and  
GREEN CONSTRUCTION CO.

Offices: Slana, Alaska; Seattle, Washington; Des Moines, Iowa; Sioux City, Iowa.

Reply by air mail to: C. F. Lytle Company and Green Construction Co., contractors Alaska highway, Fairbanks, Alaska, P.O. Box 898.

Slana, Alaska.

Gulkana, Alaska,

August 22, 1942.

Hansen & Rowland, Inc.,  
Tacoma, Washington.

Attn. of Mr. I. C. Rowland:

Dear Sir:

Enclosed herewith are copies of statements of expenditures of wages covering payrolls up through July 31, inclusive, with attached schedules showing voucher number references that will enable your auditor to audit these figures, should you find it



(Testimony of I. C. Rowland.)

necessary. This statement of expenditures of wages does not include employees in the Lytle & Green office at Seattle, Washington, and it will be necessary for your agents in Seattle to secure these figures.

You have not acknowledged receipt of my letter dated August 6th, in which I recommended that your Seattle agents contact Mr. Peterson, our branch office manager, in the Smith Tower, to secure the necessary figures on payrolls from June 17th through July 15th, inclusive. Since these disbursements were made in Seattle, I am of the opinion that the statement of expenditure of wages would be easier to compile there than here in Alaska, since we still have not received copies of the payrolls that were prepared and paid in Seattle.

I will continue to make statement of expenditure of wages on all payrolls that are prepared and disbursed here in Alaska.

Hoping this meets with your approval, I remain

Very truly yours,

C. F. LYTLE and

GREEN CONSTRUCTION CO.

GEORGE ROACH,

Asst. Office Manager.

GR:ej

enc.

June 17—(In pencil)

## (Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 6—(Continued)

## STATEMENT OF EXPENDITURE OF WAGES

No. Vo.	Contractor	Pay Period	Gross	Board & Room	Net
1.	William Horrabin Contracting Co.	7-16 to 7-31 Inc.	\$ 12,201.72	\$ 1,000.50	\$ 11,201.22
2.	Frank Eblen & Orville Eblen	7-16 to 7-31 Inc.	15,198.34	1,692.00	13,506.34
3.	Duvall and McKinney	7-16 to 7-31 Inc.	21,463.05	2,232.00	19,231.05
4.	J. Leo Hoak	7-16 to 7-31 Inc.	31,144.64	3,543.00	27,601.64
5.	Ira Van Buskirk	7-16 to 7-31 Inc.	14,199.41	1,632.00	12,567.41
6.	J. W. Scothorn Construction Co.	7-16 to 7-31 Inc.	13,778.74	1,560.00	12,218.74
7.	L. Peterson	7-16 to 7-31 Inc.	11,985.60	1,296.00	10,689.60
8.	Western Engineering Company	7-16 to 7-31 Inc.	18,903.55	2,028.00	16,875.55
9.	E. M. Duesenberg, Inc.	7-16 to 7-31 Inc.	27,047.91	3,120.00	23,927.91
10.	Sears Construction Co.	7-16 to 7-31 Inc.	13,456.55	1,536.00	11,920.55
11.	Gus Osterman	7-16 to 7-31 Inc.	14,314.35	1,545.00	12,769.35
12.	L. Peterson	8-1 to 8-15 Inc.	146.68	21.00	125.68
13.	Welden Brothers	7-16 to 7-31 Inc.	20,298.37	2,160.00	18,138.37
14.	V. L. Lundeen, Inc.	7-16 to 7-31 Inc.	12,321.23	1,368.00	10,953.23
15.	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	12,281.53	2,049.50	10,232.03
16.	Frank Eblen & Hilding Ekdahl	7-16 to 7-31 Inc.	11,942.79	1,329.00	10,613.79
17.	Western Engineering Co.	8-1 to 8-15 Inc.	158.48	22.50	135.98
Totals:			\$250,842.94	\$28,134.50	\$222,708.44

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 6—(Continued)

Hansen & Rowland, Inc., of Alaska  
201 Washington Building  
Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

## STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company  
Green Construction Co.

and/or	\$ 12,281.53*	\$	4.895
Frank & Orville Eblen	15,198.34		6.059
Ira Van Buskirk	14,199.41		5.661
Gus Osterman	14,314.35		5.707
E. M. Dusenbergl, Inc.,	27,047.91		10.783
Sears Construction Co.	13,456.55		5.365
J. W. Shothorn Construction	13,778.74		5.493
Frank Eblen & Hilding Ekdahl	11,942.79		4.762
V. L. Lundeen, Inc.	12,321.23		4.912
Wm. Harrabin Contracting Co.	12,201.72		4.864
Western Engineering Co.	18,903.55	158.48**	7.599
L. Peterson	11,985.60	146.68**	4.837
Weldon Brothers	20,298.37		8.092
Duvall & McKinney	21,463.05		8.556
J. Leo Hoak	31,144.64		12.416
Others (List below)			100.000
	\$250,537.78	\$305.16	
	305.16		
Gross payrolls paid in Alaska:	\$250,842.94		

\* Does not include payroll covering employees in Lytle & Green office at Seattle, Washington.

\*\* Discharge Payroll Period 8-1-42 to 8-15-42 inclusive.

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 6—(Continued)

Payroll Period 7-16-42 to 7-31-42.

Total Remuneration	\$250,842.94
Rate .85c	<hr/>
Earned Premium	\$ 2,132.16

C. F. LYTLE COMPANY &/or  
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Title Asst. Office Manager.

Mr. Peterson: I ask the Court to look at the second page of that, particularly, and call the Court's attention to the fact that the premium was computed by the defendants—the earned premium.

Q. Mr. Rowland, I show you now Plaintiff's Exhibit No. 7 and ask you when that came into your possession?

A. When it came into my possession?

Q. Yes. A. Shortly after.

Q. Or your office?

A. Shortly after, August 31st.

Q. That is the date it bears?

A. It is dated August 31st.

Q. And that was received through the—how was that received?

A. It was received through the mail from Alaska.

Q. I will ask you whether or not that was in

(Testimony of I. C. Rowland.)

connection with this policy of insurance which has been introduced in evidence?

A. Yes, it was.

Mr. Peterson: We offer Exhibit No. 7 in evidence?

Mr. Sager: What is that?

Mr. Peterson: That is a periodical—what is the date of that, 31st of August—periodical statement covering one of the periods.

The Court: Any objection, Mr. Sager?

Mr. Sager: No, I think it has been admitted in the request for admissions.

The Court: It may be admitted.

(Whereupon, document referred [34] to was then received in evidence and marked Plaintiff's Exhibit No. 7.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 7

C. F. LYTLE COMPANY and  
GREEN CONSTRUCTION CO.

Gulkana, Alaska

Mail Address: P. O. Box 989, Fairbanks, Alaska

Offices: Slana, Alaska; Seattle, Washington; Des  
Moines, Iowa; Sioux City, Iowa.

August 31st, 1942

Mr. I. C. Rowland  
Hansen & Rowland, Inc.  
General Agents,  
Tacoma, Washington.

Dear Sir:

Re: Phoenix Indemnity Company Policy No.  
CLP 1750.

Attached herewith is "Statement of Expenditure of Wages" No. 2 covering payroll checks that were issued and disbursed by the Public Roads Administration for the period August 1st, 1942 to August 15th, 1942 inclusive.

I have never received your acknowledgment of receipt of Statement No. 1 and whether or not it was filled out to your satisfaction. Also, have you been able to secure the necessary figures on payrolls

(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 7—(Continued)

issued by the Public Roads Administration in Seattle, Washington?

Very truly yours,

C. F. LYTLE COMPANY &  
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Asst. Office Mgr.

GR/gr

Hansen & Rowland, Inc., of Alaska  
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

# STATEMENT OF EXPENDITURE OF WAGES No. 2

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company			
Green Construction Co.	\$ 200.00	\$ 26.66**	
and/or	11,391.13	* 1,124.20***	5.296
Frank & Orville Eblen	13,960.11		5.803
Ira Van Buskirk	13,243.81		5.505
Gus Osterman	13,683.66		5.688
E. M. Dusenbergl, Inc.,	26,094.23		10.847
Sears Construction Co.	12,692.37		5.276
J. W. Shothorn Construction	13,103.45		5.447
Frank Eblen & Hilding Ekdahl	11,993.34		4.985
V. L. Lundeen, Inc.	11,636.76		4.837
Wm. Harrabin Contracting Co.	13,651.18		5.674
Western Engineering Co.	17,156.23		7.131
L. Peterson	11,111.40		4.619

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 6—(Continued)

Weldon Brothers	18,562.22		7.716
Duvall & McKinney	20,395.35		8.478
J. Leo Hoak	30,547.78		12.698
Others (List below)			100.000
	\$239,423.02	\$1,150.86	
	1,150.86		
Gross payrolls this period:	\$240,573.88		

\* Does not include payroll for employees in Lytle & Green office, Seattle, Washington.

\*\* Discharge payroll for period 8-16-42 to 8-17-42 inclusive.

\*\*\* Supplementary payroll for period 7-16-42 to 7-31-42 inclusive.

Payroll Period 8-1-42 to 8-15-42.

Previous total .....	\$250,842.94
Total this period .....	240,573.88
Total this period .....	240,573.88
	.85
Premium to date .....	\$ 4,177.04
Less previous premium .....	2,132.16
Premium this period .....	\$ 2,044.88
Total Remuneration .....	\$240,573.88
Rate .85c	
Earned Premium .....	\$ 2,044.88

C. F. LYTLE COMPANY &/or  
GREEN CONSTRUCTION CO.  
By GEORGE ROACH  
Title Asst. Office Manager.



(Testimony of I. C. Rowland.)

Plaintiff's Exhibit No. 7—(Continued)  
STATEMENT OF EXPENDITURE OF WAGES No. 2

Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
	Totals f'wd. from last Statement		\$250,842.94	\$ 28,134.50	\$222,708.44
18	C. F. Lytle Co. & Green Constr. Co.	8-1 to 8-15 Inc.	11,391.13	1,890.00	9,501.13
19	V. L. Lundeen, Inc.	8-1 to 8-15 Inc.	11,636.76	1,282.50	10,354.26
20	William Horrabin Contracting Co.	8-1 to 8-15 Inc.	13,651.18	1,485.00	12,166.18
21	J. W. Seothorn Construction Co.	8-1 to 8-15 Inc.	13,103.45	1,459.50	11,643.95
22	L. Peterson	8-1 to 8-15 Inc.	11,111.40	1,203.00	9,908.40
23	Sears Construction Co.	8-1 to 8-15 Inc.	12,692.37	1,440.00	11,252.37
24	Ira Van Buskirk	8-1 to 8-15 Inc.	13,243.81	1,507.50	11,736.31
25	Frank Eblen & Orville Eblen	8-1 to 8-15 Inc.	13,960.11	1,560.00	12,400.11
26	Gus Osterman	8-1 to 8-15 Inc.	13,683.66	1,462.50	12,221.16
27	Welden Brothers	8-1 to 8-15 Inc.	18,562.22	1,947.00	16,615.22
28	Frank Eblen & Hilding Ekdahl	8-1 to 8-15 Inc.	11,993.34	1,288.50	10,704.84
29	E. M. Duesenberg, Inc.	8-1 to 8-15 Inc.	26,094.23	2,917.50	23,176.73
30	Duvall & McKinney	8-1 to 8-15 Inc.	20,395.35	2,092.50	18,302.85
31	Western Engineering Co.	8-1 to 8-15 Inc.	17,156.23	1,852.50	15,303.73
32	J. Leo Hoak	8-1 to 8-15 Inc.	30,547.78	3,601.50	26,946.28
			26.66	6.00	20.66
33	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-17 Inc.			
34	C. F. Lytle Co. & Green Constr. Co.	8-1 to 8-15 Inc.	200.00	45.00	155.00
35	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	1,124.20	111.00	1,013.20
Total to Date :			\$491,416.82	\$ 55,286.00	\$436,130.82

(Testimony of I. C. Rowland.)

Mr. Peterson: I think all of these have, Your Honor, but I just wanted to show receipt.

Q. I show you now Plaintiff's Exhibit No. 8, and ask you how that came into your possession?

A. It came in through the mail.

Q. Direct your attention to the date and ask you what date?

A. It was mailed in Seattle, Washington, on September 23rd, 1942.

Q. I will ask you whether that was in connection with this insurance policy? A. It was.

Mr. Peterson: We offer Exhibit No. 8 in evidence, if the Court please.

Mr. Sager: I have no objection.

The Court: It may be admitted.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 8.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT NO. 8

C. F. LYTLE COMPANY and  
GREEN CONSTRUCTION CO.

Offices: Slana, Alaska; Seattle, Washington; Des  
Moines, Iowa; Sioux City, Iowa.

Seattle, Wash.,  
September 23, 1942

Hansen & Rowland, Inc.  
Tacoma  
Washington

Attention: Mr. Tinius

Gentlemen:

We enclose herewith Payroll Audit from June 17  
to August 31 on the Seattle Branch Office.

Mr. Bradshaw and Mr. Coykendall are shown  
as paid at two rates. This is due to the fact that  
the Public Roads Administration approved their  
salaries at \$750 per month and the contractor is  
paying them \$250 per month out of his fee.

Very truly yours,

C. F. LYTLE COMPANY and  
GREEN CONSTRUCTION CO.

Alaska Highway Division  
E. C. PETERSON,  
E. C. Peterson,  
Branch Manager

ecp:mh

enc:

cc: Mr. W. E. Corbin

(Testimony of I. C. Rowland.)

Employees paid direct by the Public Roads Administration. C. F. Lytle Company & Green Construction Co. Contract # WA4PR-14299

Paid to 8/31/42

Margaret L. Herman—\$1620.00 annual pay.....	\$337.50
Marie Vander Meyden—\$1800.00 annual pay.....	375.00
Elwin C. Peterson—\$400.00 monthly pay.....	1,200.00

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 \$1,912.50

Employees paid by C. F. Lytle Company and Green Construction Co. and reimbursed by the Public Roads Administration

Valerie Gardiner—

2½ days in June @ \$120.00 per mo. \$ 10.00

J. J. McDonnell—

7 days in June @ \$325.00 per mo. 88.40

E. L. Bradshaw—

May—4 days @ \$25.00 per day	100.00	} **out
*May—4 days @ \$7.25 per day	29.00	

June—30 days @ \$25.00 per day	750.00	} **19 days out	
			475
			158.33

*June—30 days @ \$8.33⅓ per day	250.00	633.33
---------------------------------	--------	--------

July—30 days @ \$25.00 per day	750.00
--------------------------------	--------

*July—30 days @ \$8.33⅓ per day	250.00
---------------------------------	--------

August—12 days @ \$25.00 per day	300.00
----------------------------------	--------

*August—12 days @ \$8.33⅓ per day	100.00
-----------------------------------	--------

Claude Coykendall—

June—23 days @ \$25.00 per day	575	} **12 days out	
			300.00
			100.00

*June—23 days @ \$8.33⅓ per day	191.67	400.00
---------------------------------	--------	--------

July—30 days @ \$25.00 per day	750.00
--------------------------------	--------

*July—30 days @ \$8.33⅓ per day	250.00
---------------------------------	--------

August—30 days @ \$25.00 per day	750.00
----------------------------------	--------

*August—30 days @ \$8.33⅓ per day	250.00
-----------------------------------	--------

(Testimony of I. C. Rowland.)

Henry L. Convey—

July—18 days @ \$316.66 per month 190.00

August—30 days @ \$316.66 per month 316.66

---

\$5,900.73

---

\* Contractors Expense and not reimbursable.

\*\* Marginal notations in pencil.

[Stamped]: Received Sep 24, 1942. Hansen & Rowland, Inc., Tacoma, Washington.

[Notation in pencil]:

1912.50

5900.73

---

7813.23

— 1162.33

---

6650.90

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The Court: You may proceed, Mr. Peterson.

Mr. Peterson: Plaintiff offers Plaintiff's Exhibit No. 9 in evidence. It is a similar certificate. It is for the pay roll period from 7-16-42 to 7-31-42. There is no letter attached to it.

Q. I show you now Exhibit No. 9, Mr. Rowland, and ask you how that came into your possession?

A. It came through the mail.

Q. From whom was it?

A. From Lytle and Green in Alaska. [35]

Q. I will ask you whether or not that was in connection with this insurance policy?

A. It was.

Mr. Peterson: We offer Exhibit No. 9 in evidence.

(Testimony of I. C. Rowland.)

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, certificate referred to was then received in evidence and marked Plaintiff's Exhibit No. 9.)

## PLAINTIFF'S EXHIBIT NO. 9

Hansen & Rowland, Inc., of Alaska  
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

### STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowances, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company

Green Construction Co.

and/or .....	\$ 12,281.53*	\$
Frank & Orville Eblen .....	15,198.34	
Ira Van Buskirk .....	14,199.41	
Gus Osterman .....	14,314.35	
E. M. Dusenbergl, Inc. ....	27,047.91	
Sears Construction Co. ....	13,456.55	
J. W. Shothorn Construction .....	13,778.74	
Frank Eblen & Hilding Ekdahl .....	11,942.79	
V. L. Lundeen, Inc. ....	12,321.23	
Wm. Harrabin Contracting Co. ....	12,201.72	
Western Engineering Co. ....	18,903.55	158.48**
L. Peterson .....	11,985.60	146.68**
Weldon Brothers .....	29,298.37	
Duvall & McKinney .....	21,463.05	
J. Leo Hoak .....	31,144.64	

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 9—(Continued)

Others (List below)

\$250,537.78	\$305.16
305.16	

Gross payrolls paid in Alaska.....	\$250,842.94
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\* Does not include payroll covering employees in Lytle & Green office at Seattle, Washington.

\*\* Discharge Payroll Period 8-1-42 to 8-15-42 inclusive.

Payroll Period 7-16-42 to 7-31-42.

Total Remuneration .....	\$250,842.94
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Rate .85c	
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Earned Premium .....	\$ 2,132.16
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C. F. LYTLE COMPANY &/or  
GREEN CONSTRUCTION CO.

By GEORGE ROACH

Title Asst. Office Manager

(Testimony of I. C. Rowland.)

**Plaintiff's Exhibit No. 9—(Continued)**  
**STATEMENT OF EXPENDITURE OF WAGES**

Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
1.	William Horrabin Contracting Co.	7-16 to 7-31 Inc.	\$ 12,201.72	\$ 1,000.50	\$ 11,201.22
2.	Frank Eblen & Orville Eblen	7-16 to 7-31 Inc.	15,198.34	1,692.00	13,506.34
3.	Duvall and McKimney	7-16 to 7-31 Inc.	21,463.05	2,232.00	19,231.05
4.	J. Leo Hoak	7-16 to 7-31 Inc.	31,144.64	3,543.00	27,601.64
5.	Ira Van Buskirk	7-16 to 7-31 Inc.	14,199.41	1,632.00	12,567.41
6.	J. W. Seothorn Construction Co.	7-16 to 7-31 Inc.	13,778.74	1,560.00	12,218.74
7.	L. Peterson	7-16 to 7-31 Inc.	11,985.60	1,296.00	10,689.60
8.	Western Engineering Company	7-16 to 7-31 Inc.	18,903.55	2,028.00	16,875.55
9.	E. M. Duesenberg, Inc.	7-16 to 7-31 Inc.	27,047.91	3,120.00	23,927.91
10.	Sears Construction Co.	7-16 to 7-31 Inc.	13,456.55	1,536.00	11,920.55
11.	Gus Osterman	7-16 to 7-31 Inc.	14,314.35	1,545.00	12,769.35
12.	L. Peterson	8- 1 to 8-15 Inc.	146.68	21.00	125.68
13.	Weldon Brothers	7-16 to 7-31 Inc.	20,298.37	2,160.00	18,138.37
14.	V. L. Lundeen, Inc.	7-16 to 7-31 Inc.	12,321.23	1,368.00	10,953.23
15.	C. F. Lytle Co. & Green Constr. Co.	7-16 to 7-31 Inc.	12,281.53	2,049.50	10,232.03
16.	Frank Eblen & Hilding Ekdahl	7-16 to 7-31 Inc.	11,942.79	1,329.00	10,613.79
17.	Western Engineering Co.	8- 1 to 8-15 Inc.	158.48	22.50	135.98
<b>Totals:</b>			<b>\$250,842.94</b>	<b>\$28,134.50</b>	<b>\$222,708.44</b>



(Testimony of I. C. Rowland.)

Q. Mr. Rowland, I will ask you whether or not your office received reports of the pay rolls from the defendants for the period prior to these certificates which we have identified and put in evidence, for the first period of the work, did you receive a certificate?      A. Yes, we did.

Q. In what form was that?

A. We received a report of the employees that were engaged on all this work, for the P.R.A.

Q. Who prepared that, do you know where it originated from?

A. Well, I could only testify I assume it was prepared up there at Alaska.

Q. I will ask you if you made a request for a report of the pay roll for the first period?

A. Yes, we did.

Q. And who did you make that to?

A. With the assured, Lytle and Green.

Q. Where?      A. In Seattle.

Q. To whom did you make that, yourself? [36]

A. I made several of them, and Mr. Miller made several of them.

Q. The one you made, who did you make it to?

A. To their manager in the Seattle office.

Q. What is his name?

A. I don't recall his name now. He was in the Smith Tower.

Q. What information did he give you regarding obtaining that?

A. He told me that we could get it from the P. R. A. office in the Hoge Building, Seattle.

(Testimony of I. C. Rowland.)

Q. The P. R. A. is the Public Roads Administration? A. Yes, it is.

Q. And who obtained—did you obtain this personally, or Mr. —

A. No, I did not obtain it personally.

Q. Well, I will put him on the stand. Now, Mr. Rowland, I will ask you whether or not along about September 1st, 1942, you received notices of cancellation of this policy? A. Yes, we did.

Q. Of insurance, and I show you now Plaintiff's Exhibit No. 11, and ask you from whom you received the exhibit?

A. Public Roads Administration of the Federal Works Agency.

Q. And were the various cancellations attached?

A. Yes.

Mr. Peterson: We offer in evidence Plaintiff's Exhibit No. 11. With the permission of the Court, and by agreement of counsel, Your Honor, I wish to detach part of Exhibit No. 11. I find that I had not noticed it before, a part of it is not material to the case and has nothing to do with it. [37]

The Court: What is Exhibit No. 11, correspondence?

Mr. Peterson: It is correspondence that has no relation to this matter.

The Court: But, that part that is relevant is likewise correspondence?

Mr. Peterson: No, this part that I am offering is the original cancellations, Your Honor, and a

(Testimony of I. C. Rowland.)

letter enclosing them; that the Green Construction Company and the named unit price contractors cancelled all in writing effective September 1st, '42.

Mr. Sager: That is true, I never knew. I am willing to agree, however.

Mr. Peterson: Stipulate that the various unit price contractors cancelled, along with the Lytle and Green——

Mr. Sager: Yes, as of August 31st.

Mr. Peterson: I desire to withdraw this exhibit, No. 11. It has not been offered yet, Your Honor.

The Court: Very well.

Q. I will show you, Mr. Rowland, a paper which purports to be an invoice dated October 6th, 1942. I will ask you whether or not that was mailed or delivered to the addressee, or Lytle, the defendant?

A. Mailed to Lytle and Green at Souix City, Iowa.

The Court: What number is that?

A. 12.

The Clerk: 12.

Mr. Peterson: That I think is covered under [38] the request for admissions, Mr. Sager, is it not?

Mr. Sager: I don't recall. I haven't any objection.

Q. Mailed by your office? A. Yes.

Q. With the postage prepaid on it?

A. Yes.

Mr. Peterson: We offer Exhibit No. 12 in evidence.

(Testimony of I. C. Rowland.)

Mr. Sager: I have no objection.

The Court: It will be admitted in evidence.

(Whereupon, invoice referred to was then received in evidence and marked Plaintiff's Exhibit No. 12.)

## PLAINTIFF'S EXHIBIT No. 12

(Copy)

Tacoma, Oct. 6, 1942

M C. F. Lytle & Green Construction Co.

Sioux City, Iowa

To HANSEN & ROWLAND, INC., Dr.

General Insurance—Surety Bonds

13th Floor Puget Sound Bank Building

Tacoma, Washington

MAin 1161

Policy CLP-1750—Comprehensive Liability

Phoenix Indemnity Company

Audit period June 17, 1942 to August 31, 1942

Payroll for C. F. Lytle and/or Green Construction

Company and/or Frank & Orville Eblen, Ira Van

Buskirk, Gus Osterman, E. M. Dusenber, Inc.,

Sears Construction Co., J. W. Shothorn Construc-

tion Co., Frank Eblen & Hilding Ekdahl, V. L.

Lundeen, Inc., Wm. Horrabin Contracting Co.,

Western Engineering Co., L. Peterson, Weldon

Brothers, Duvall & McKinney, J. Leo Hoak:

(~~1,055,214.02~~)

Total Payroll \$309,821.42 @ .85 M

1.801 short rate cancellation factor \$16,153.73

This is to Certify:

(1) That the amount stated herein is a correct premium charge for the insurance afforded by the policy.

(2) That the computation is based upon a period not in excess of the time elapsed between the date of the commencement of work and the date of completion thereof.

(3) That only the payrolls for the work done under the contractor's obligation to the government have been considered in the computation of the premium.

(Testimony of I. C. Rowland.)

(4) That the premium covers no insurance extending to any operation or location not a part of the work performed by the contractor under his contract with the government in connection with the construction of approximately 155 miles of Alaska Highway from Slana, Alaska to the Canadian line.

The above bill is correct and just; and payment therefore has not been received.

HANSEN & ROWLAND, INC., OF ALASKA  
General Agents

By I. C. ROWLAND,  
Secretary-Treasurer

---

Q. Mr. Rowland, I show you Plaintiff's Exhibit No. 13, purporting to be a letter addressed to the defendants at Souix City, Iowa. I ask you if that letter was written and mailed by—written by you—that is, dictated? A. It was.

Q. And when was it mailed?

A. On January the 25th, 1943.

Q. In the usual course? A. Yes.

Q. Mr. Rowland, I show you Plaintiff's Exhibit No. 14, will you please tell the Court how that came into your possession?

Mr. Peterson: Did I offer 13?

The Court: No, you have not.

Mr. Sager: I haven't any objection to it.

Mr. Peterson: The plaintiff offers Exhibit [39]  
No. 13.

The Court: It will be admitted.

(Whereupon, document referred to was then received in evidence, and marked Plaintiff's Exhibit No. 13.)

(Testimony of I. C. Rowland.)

**PLAINTIFF'S EXHIBIT No. 13**

H. T. Hansen, Pres.

I. C. Rowland, Secy.

Hansen & Rowland, Inc.

General Agents

Surety Bonds - General Insurance

Tacoma, Seattle, Portland

Tacoma, Washington

January 25, 1943

This communication if signed as agent or agents shall bind in such capacity only. Please address all communications to Hansen & Rowland, Inc., not to individuals.

Messrs. C. F. Lytle and Green Construction Co.,  
Sioux City, Iowa.

Attention: Mr. Harvey Rice.

Gentlemen:

Re: Policy CPL-1750—Comprehensive Liability, Phoenix Indemnity Company—Alcan Highway

On October 7, 1942, we wrote you enclosing our invoice for \$16,153.73, being the earned premium in accordance with policy conditions for the above policy, which was cancelled at your request.

We have not yet been favored with remittance and feel that sufficient time has elapsed and we must now request that payment be made. We trust

(Testimony of I. C. Rowland.)

that you will let us have your check by early mail.

Yours very truly,

HANSEN & ROWLAND INC.

of Alaska,

General Agents.

I. C. ROWLAND,

Secretary.

ICR:ft

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Q. Your attention was directed to Exhibit No. 14. Will you please tell the Court how that came into your possession, Mr. Rowland?

A. It came through the mail and was received by us on February 1st, 1943.

Q. And do you know Mr. H. L. Rice?

A. Yes.

Q. Whose name is signed to it? A. Yes.

Q. What is his position with the defendants, or was, at that time?

A. He was called business manager.

Q. I will ask you whether or not Mr. Rice was the gentleman with whom you had your negotiations looking towards the providing of the insurance?

A. Yes.

Mr. Peterson: We offer Exhibit No. 14.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 14.)

(Testimony of I. C. Rowland.)

PLAINTIFF'S EXHIBIT No. 14

Real Estate, Store Leases, Industrial Sites.  
Insurance, Fire and Casualty, Surety Bonds.

C. F. Lytle Company

Incorporated

505 Nebraska Street

Sioux City, Iowa

January 30, 1943.

Mr. I. C. Rowland, Secretary

Hansen & Rowland Inc.

Tacoma, Washington.

Dear Mr. Rowland:

This will acknowledge receipt of your letter of January 25th in regard to the unpaid premium on the comprehensive liability policy written for Lytle & Green.

Mr. Peterson of the Lytle & Green, Seattle office is here at this time and expects to return to Seattle next week. I am asking him to take this up immediately, with the P. R. A. office and try to get the matter disposed of without further delay. It should have been paid long ago and we regret that it has not been properly taken care of.

Very truly yours,

C. F. LYTLE COMPANY

By H. L. RICE

H. L. Rice

HLR/hs

CC/Hansen & Rowland, Inc.

Dexter-Horton Bldg.,

Seattle, Washington.



(Testimony of I. C. Rowland.)

Mr. Peterson: We offer Exhibit 14 in evidence.

The Court: It is admitted.

Q. Mr. Rowland, I show you Identification No. 15 and ask you [40] from whom you received that?

A. From the home office of the Phoenix Indemnity Company.

Q. That is an assignment of this claim?

A. Yes, it is an assignment of the claim to Hansen & Rowland, Inc.

Mr. Peterson: We offer Exhibit No. 15 in evidence if the Court please.

Mr. Sager: No objection.

The Court: It will be admitted.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 15.)

## PLAINTIFF'S EXHIBIT No. 15

### ASSIGNMENT

Know All Men By These Presents: That Phoenix Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of New York and authorized to do business in the State of Washington, does hereby sell, assign, transfer and set over unto Hansen & Rowland, Inc., a corporation of Tacoma, Washington, all claims and demands that it may have against C. F. Lytle Company of Sioux City, Iowa, and Green Construction Company of Des Moines, and Frank and Orville Ehlen, Ira Van Buskirk, Gus Osterman, E. M. Duesenberg, Inc., Sears Construction Co.,

(Testimony of I. C. Rowland.)

J. W. Scothorn Construction Co., Frank Eblen and Hilding Ekdahl, V. L. Lundeen, Inc., Wm. Horrabin Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duval & McKinney and J. Leo Hoak, and each of them, on account of premiums accruing under that certain policy of insurance No. CLP-1750 and endorsements and extensions thereof issued by the undersigned to said persons above named on or about the 17th day of June, 1942, hereby giving and granting unto said Hansen & Rowland, Inc., full power and authority in the name of the undersigned or otherwise to demand, sue for, collect and receive said demands or any part thereof, and to release, discharge or satisfy the same as effectually and to all intents and purposes as the undersigned might or could do.

In Witness Whereof Phoenix Indemnity Company has caused these presents to be executed by its proper officers thereunto duly authorized and its corporate seal to be hereunto affixed.

Dated July 9th, 1943.

[Seal]

PHOENIX INDEMNITY  
COMPANY,

By JAMES MURRAY HAINES  
President.

Attest:

J. F. CUNNINGHAM  
Secretary.

(Testimony of I. C. Rowland.)

State of New York

County of New York—ss.

On the 26th day of July in the year of 1943, before me personally came James Murray Haines, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan in the City of New York; that he is the president of the Phoenix Indemnity Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of the said corporation, and that he signed his name thereto by like order.

HOWARD M. BORST

Howard M. Borst,

Notary Public, Queens Co. Clks. No. 187, Reg. No. 229-B-5 Cert. filed N. Y. Co. Clks. No. 867, Reg. No. 501-B-5 Commission Expires March 30, 1945.

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Mr. Peterson: You may cross-examine.

Cross Examination

By Mr. Sager:

Q. Mr. Rowland, you know Mr. H. R. Northrup?  
A. Yes.

Q. Do you know what his—do you know who he is with, or what his position is?

A I don't know or recall what his title is. He is with the P. R. A., Public Roads Administration.

(Testimony of I. C. Rowland.)

Q. When did you become acquainted with him?

A. Some time in 1942, the latter part.

Q. Where did you first see him?

A. First met him in Seattle.

Q. That was in connection with this policy of insurance?

A. No, it was not.

Q. What was the purpose of that meeting?

A. It was in connection with the Okes Construction Company [41] compensation contract, which contractors were located at St. Paul and had a contract on the Alaska Highway between Fort St. John and Fort Nelson, and from whom we had received an order to write compensation insurance, and the discussions had with Mr. Northrup at that time were relative to the rate and the underwriting plan in that particular contract.

Q. That Okes Construction contract was public compensation——

Mr. Peterson: I think this is not proper cross-examination, Your Honor.

The Court: Oh, he may answer that.

The Witness: I did not hear you.

Q. That Okes Construction was another insurance policy of some type that you had written on one of these cost-plus contracts?

A. Yes, for compensation insurance to bring the pay of Federal Harbor Workers' Benefits to injured workmen.

Q. Who arranged for that meeting between you and Mr. Northrup at Seattle?

A. I guess we arranged it ourselves.

(Testimony of I. C. Rowland.)

Q. Well, I mean, did he call you for a meeting or did you call him?

A. I believe our Seattle manager, Mr. Miller, contacted him first and arranged an appointment for me.

Q. At that time, you knew that he was looking after the insurance matters for the Public Roads Administration, did you?

A. On the Okes Construction contract.

Q. Do you recall when that meeting was in Seattle, about?

A. No, I can't give you the exact date. If I could refer [42] to my files I probably could.

Q. I show you Defendants' Exhibit A-1, Mr. Rowland, and ask you to examine that, and it purports to be a copy of a letter which you wrote, and ask you if it is—if that refreshes your recollection with respect to that meeting in Seattle with Mr. Northrup? A. Yes, I wrote that letter.

Q. And from that, can you fix approximately when your meeting in Seattle was with Mr. Northrup?

A. It must have been about June 27th, 1942.

Q. That is the date of that letter, is it?

A. Yes.

Q. Now at that meeting in Seattle did you discuss with Mr. Northrup the Lytle and Green coverage?

A. I told him—advised him what coverage had been placed.

(Testimony of I. C. Rowland.)

Q. And at that time it was only in binder form, I assume?

A. The coverage had been placed. I don't know whether the policy had been issued or whether it was just a binder.

Q. Don't your know when the policy was actually issued?

A. I can't recall the exact date the policy was issued.

Q. You refer in this letter, this exhibit that you have, to the binder? A. Yes.

Q. Enclosed him a copy of it? A. Yes.

Q. Is that correct? A. Yes.

Mr. Sager: We offer A-1 in evidence.

Mr. Peterson: Your Honor, this three-page letter, that has been handed to the witness for the [43] purpose of refreshing his recollection, only. It is a three-page letter and it contains this reference only to C. F. Lytle and Green Construction Company:

"We hand you herewith a copy of the binder which we have delivered as evidence that we have placed in the Phoenix Indemnity Company Public liability and property damage insurance covering liability and property damage insurance in connection with their operations in the building of the Alaska Highway from Slana, Alaska, easterly to the Canadian Border, approximately 155 miles. This is all of the insurance that we have bound for this assured in connection with that project."

Then he goes on to the Okes Construction Com-

(Testimony of I. C. Rowland.)

pany, two full pages of single spaced typewriting. That was tendered to the witness only for refreshing his recollection. We think it is entirely inadmissible.

The Court: Of course, the Court has not read it. What is your purpose Mr. Sager?

Mr. Sager: Well, my purpose is to show Mr. Rowland was negotiating—speaking about this contract and the Lytle and Green contract from this time on; that he recognized Mr. Northrup, who was the P. R. A. representative, as having authority at least, whatever these will show with respect to these insurance policies, and I think——

The Court: It certainly would be very relevant and material if the government were a party to this action.

Mr. Sager: It seems to me it is relevant to show—here is a policy between this company and the insured. He recognized Mr. Northrup as one qualified to negotiate on this policy, certainly, as an agent of the [44] insured, and there is no other——

The Court: I think I shall admit it and allow you an exception. I am doubtful of its relevancy outside of the very first paragraph, and that is admitted by the witness.

Mr. Peterson: That is already in evidence, anyway. I am not objecting on the ground it is a copy, but on the grounds it is irrelevant and immaterial.

(Whereupon, paragraph of letter referred to was then received in evidence and marked Defendants' Exhibit No. A-1.)

(Testimony of I. C. Rowland.)

DEFENDANT'S EXHIBIT No. A-1

(Copy)

Hansen & Rowland Inc.

General Agents

Tacoma - Seattle - Portland

Tacoma, Washington

June 27, 1942

Mr. H. R. Northrup

Hungerford Hotel

Seattle, Washington

Dear Mr. Northrup:

Re: C. F. Lytle Company and Green Construction Company, Sioux City, Iowa. Okes Construction Company, St. Paul, Minnesota

I appreciated the opportunity of discussing with you the insurance coverages which we have placed in connection with the operations of the above contractors on the Alaska Road.

C. F. Lytle Company and Green Construction Company, Sioux City, Iowa.

We hand you herewith a copy of the binder which we have delivered as evidence that we have placed in the Phoenix Indemnity Company public liability and property damage insurance in connection with their operations in the building of the Alaska Highway from Slana, Alaska, easterly to the Canadian border, approximately 155 miles.

This is all of the insurance that we have bound for this assured in connection with that project.



(Testimony of I. C. Rowland.)

Okes Construction Company, St. Paul, Minnesota.

This concern has the contract for the construction of that unit of the Alaska Road between Fort St. John and Fort Nelson, B. C., and we have bound the Phoenix Indemnity Company of New York in accordance with the Federal Harbor Workers and Longshoremen's Compensation Act as it is our understanding that all employees of the Okes Construction Company will be American citizens resident in the United States and compensation benefits will be payable under the Longshoremen's Act in accordance with the Base Defense Act.

The insurance was bound as of 12:01 a.m., June 19, 1942, and we attach hereto copy of a letter which we addressed to Mr. Wm. A. Marshall, Deputy Commissioner, Colman Building, Seattle, Washington, and copy of letter which we addressed to the Federal Works Agency, Public Works Administration, Hoge Building, Seattle.

At this writing we have been unable to secure information as to the requirements of medical aid, but we understand that the Government are at the present time handling the medical, and, until our conference of yesterday, we did not know that the insurance required would come under the War Department Plan and we were proceeding to arrange for the servicing requirements at Fort St. John on the basis of the usual coverage.

It is our understanding that the compensation of all of the associated contractors connected with Okes Construction Company would likewise be

(Testimony of I. C. Rowland.)

placed with us, because unless the volume were sufficiently large it would not warrant the installation of the necessary servicing units, and Okes Construction Company have indicated that it was their plan to request all of the associated contractors to place their insurance requirements with the same carrier.

The writer had planned to leave Seattle last night, Friday, June 26, for St. Paul to assemble the necessary information for the rating of the risk, and then proceed to New York and discuss the subject with our Home Office and, if possible, arrive at an average rate which would greatly simplify the handling of payroll reports and rate classifications. As it developed the writer was unable to leave Friday and is, therefore, leaving today.

We have also bound Underwriters at Lloyd's, London, against all-risk of loss and damage to contractors' equipment, supplies, stores, temporary structures, forms, etc., as more particularly set forth in the form let with you last night. This was in the amount of \$300,000.00, but limited to a maximum loss on any one occurrence of \$150,000.00. We have not established the rate pending the writer's discussions in St. Paul as there may be some phases of the coverage that will not be required.

We used the Lloyd's market because we were in a position to in one contract give a very broad form of coverage and since the moving in of this equipment entails a diversity of hazards, such as transportation over water involving marine perils and

(Testimony of I. C. Rowland.)

by other modes of transportation, the details of which it was difficult for us to secure at the time. Under our contracts with Underwriters at Lloyd's we are authorized to immediately accept insurances and bind the Underwriters on a **comprehensive all-risk** form, and under these contracts our firm is authorized to handle, negotiate and settle losses with drafts issued by our firm drawn upon us when the proofs of loss have been filed and accepted.

As soon as the final details of the total values and the particulars as to coverage are definitely determined the writer will write you further and discuss the matter when he meets you in Washington.

This constitutes all of the insurance which we have bound up to the present time for either of these contractors and we have been informed by Messrs. Lytle and Green and Mr. Marshall and Mr. Morris that Lytle and Green will not require compensation insurance on their contract since their employees are all designated as Federal employees.

The details of the public liability insurance for Okes Construction Company are to be discussed with them by the writer while in St. Paul, but it is our understanding that they have this temporarily bound with the Canadian Indemnity Company.

Should there be any information which you might wish the writer to obtain for you from either Okes Construction Company or Lytle and Green while contacting them at St. Paul and Sioux City, please advise either Mr. Miller or Mt. Totten of our firm and they will immediately contact the writer, and

(Testimony of I. C. Rowland.)

unless we hear from you otherwise he will communicate with you or your office on Monday, July 6, as he anticipates being in New York at the Waldorf Astoria on that date and will come to Washington at such time as may be agreeable to you.

Very truly yours,

HANSEN & ROWLAND, INC.

General Agents

/s/ I. C. ROWLAND

I. C. Rowland

Secretary

ICR:FT

Encs.

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Q. Mr. Rowland, the insurance policy involved in this case was mailed to Mr. Bright of the Public Roads Administration of Seattle—the original policy?

A. I believe the original policy was mailed to Lytle and Green, and several copies were supplied Mr. Bright in Seattle.

Q. Isn't it the other way around, that the original was sent to Mr. Bright of the P. R. A., and that copies were sent to the contractors?

A. Not that I recall.

Q. I show you Plaintiff's Exhibit A-2, a copy of a letter written by you to Mr. Northrup. Is that a copy of the letter?           A. Yes.

(Testimony of I. C. Rowland.)

Q. Do you want to change your testimony as to where the original went, in view of that letter?

A. Under the practice on any of these contracts, we prepare so many originals——

Q. You just answer my question, Mr. Rowland.

[45]

A. All right, what is your question?

Q. Did you send the original to Mr.—the P.R.A., or to the contractor?

A. This letter says——

Q. Never mind what it says.

A. We are enclosing a certified original.

Q. Where did you send the original, do you know, now?

A. I still say our practice would be to send it to Lytle and Green. This is a certified original.

Q. Well, I will hand you a copy of a letter. This is Plaintiff's—or Defendants' Exhibit A-4, which purports to be a copy of a letter from you to C. F. Lytle Company, and ask you to examine that.

Now, can you testify now as to who you sent the original to? A. This letter says——

Mr. Peterson: Mr. Rowland, I would like to see that.

A. This letter says we sent the original policy to Mr. Bright, Federal Works Agency.

Q. The letter of course will speak for itself, Mr. Rowland. Do you recall now to whom you sent the original policy?

A. This letter says it was sent to Mr. Bright.

(Testimony of I. C. Rowland.)

Q. You haven't any recollection?

A. I don't have any recollection.

Q. The letter speaks the truth, I presume?

A. I assume it does.

Q. Now, I show you Plaintiff's Exhibit A-3, which purports to be a copy of a letter from you to the Federal Works Agency at Seattle, and Public Roads Administration, Mr. [46] Bright——

Mr. Peterson: What date is that, Mr. Sager, please.

A. July the 30th.

Mr. Peterson: July the 30th.

The Court: It is now time for the noon intermission. We will take a recess so we will have an intermission until 2:00 o'clock, and Mr. Sager, in the meantime I want you to give consideration to the suggestion made at the outset of this case. Under the state of the pleadings as they are now, neither fraud being alleged affirmatively nor mistake being alleged nor claimed, and the Court having determined in its pre-trial hearing that the action as made by the pleadings then before it was an action upon an account stated, and I shall give you an opportunity and give consideration to an application to amend, if you desire, so to bring you within one of the proper defenses under an account stated, or, if it is the federal government's position here that it is a party directly in interest in this litigation and desires permission to intervene as such, the Court will give consideration to such a motion, but on the state of the pleadings as

(Testimony of I. C. Rowland.)

they are now, you will have to comply with the well known established rules of law concerning defenses to an account stated, and if there is—if it is claimed that there was an error in the amounts involved or in the assumption of liability or any of the other matters that might become a defense—I make this line of suggestion because you state that the proof would show as a fact that [47] numerous of these independent contractors or sub-contractors or others were not on this job at all, but there is nothing in this pleading but just a mere denial—that is the only thing you have here that would entitle the defendants to have formally submitted the pay rolls, unless they did it by error or did it with a fraudulent intent, and if they did, then it could only be availed of, no one would be taken advantage of by the government who is not a party to this action at present, and it is not the desire of this Court at all to invade the province of the administrative departments of the federal government in the matter of when they assume liability and pay on these cost-plus fixed fee contract items, and when they deny payment on them, and the difficulty of the whole situation presented here in this case is, that apparently the nominal defendants appear rather indifferent as to the outcome, and pass the burden to the federal government upon whom they assume liability shall fall, and that question is one that will have to be determined by administrative agencies of the government, rather than judicial,

(Testimony of I. C. Rowland.)

unless the government sees fit to make itself a party and bring itself before this Court so it would be bound by its judgment.

I wish you would consider the suggestion that the Court has made, because I have been rather liberal thus far in permitting even this cross-examination going rather beyond the issues as made by the pleadings here.

Mr. Sager: Of course, the pleadings deny any account stated. There can't be any question about that.

The Court: I know, but if you will examine [48] the law on an account stated, there are certain defenses that you can have, and the Court has determined in a pre-trial hearing that there was an account stated.

Mr. Sager: Well, now, then, perhaps I misunderstand, if Your Honor is taking the position that you have previously determined that question finally, and that there is only left an affirmative defense to it, then I can see where I stand. I have been assuming right along that in view of the changed pleading the question of whether or not there was an account stated was again open.

The Court: What have you set up in your pleadings that opens it, other than a denial that there is an account stated?

Mr. Sager: We have set up in addition to that, this period of negotiations and conduct between the parties, which negatives——

The Court: I take it, your affirmative matter,



(Testimony of I. C. Rowland.)

Mr. Sager, just merely sets up if liability is established here, it is going to fall on the government?

Mr. Sager: That is not the intent of my pleading. The affirmative defense, as I intended it, was to show by their course of conduct between the parties, that there was never an account stated because there was no final unequivocal meeting of minds or agreement by the defendants here to pay—no understanding or reliance by the insurance company that there was a definite agreement to pay this amount; that they had been negotiating this thing over this whole period of time. In other words, my affirmative defense goes to the question of whether there is an account stated. [49]

Now, if Your Honor says you have already ruled on that—

The Court: That is the reason we had the pre-trial hearing, and I did rule upon it at the time as the record was then made, it was an account stated.

Mr. Sager: That is true. I thought it was under the then status of the pleadings. There was an answer filed subsequently to that, which set forth this course of conduct between the parties, which I assumed would open up again at least to show the course of conduct, to show the true situation, whether there was an account stated.

The Court: I am just doubtful whether your pleadings do that in the form in which you have them.

Mr. Sager: Well, I will re-examine that.

The Court: And certainly, if the Court deter-

(Testimony of I. C. Rowland.)

mines there is an account stated, you have left yourself in a position where you haven't any right to offer proof there was an error in the sum involved—in the amount involved.

Mr. Sager: There is no question of that. It is true, under the present state of pleadings we have not.

The Court: We will recess until 2:00 o'clock this afternoon.

(Recess.) [50]

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2:00 O'Clock P.M.

The Court: Now, you may proceed.

Mr. Sager: I am asking to file a second amended answer in this matter, Your Honor, in which we set up an affirmative defense.

The Court: Any objections, Mr. Peterson, to this?

Mr. Peterson: I am just examining it, Your Honor. I will be through in a moment.

I think not, Your Honor.

The Court: It may be filed.

Mr. Sager: We offer at this time, Plaintiff's Exhibits A-2, A-3—Defendants' Exhibits A-2, A-3 and A-4.

Mr. Peterson: We have no objection to Defendants' Exhibit A-2.

The Court: It will be admitted.

(Whereupon, document referred to was then

(Testimony of I. C. Rowland.)

received in evidence and marked Defendants'  
Exhibit A-2.)

DEFENDANTS' EXHIBIT No. A-2

(Copy)

Hansen & Rowland, Inc.

General Agents

Tacoma, Washington

July 30, 1942

Air Mail

Mr. H. R. Northrup

Care of Insurance Section

Office of the Administrator

Federal Works Agency

North Interior Building

Washington, D. C.

Dear Mr. Northrup:

Re: Property Damage and Public Liability  
Policy No. CLP 1750—C. F. Lytle Com-  
pany and Green Construction Company  
Etal—Alaska Highway, Slana to Canadian  
Border

Enclosed herewith you will please find a certified  
original copy of a public liability policy, the origi-  
nal of which we have mailed to Mr. J. S. Bright,  
Hoge Building, Seattle.

We trust that the policy in the form as prepared  
meets with your approval, but if you have any sug-  
gestions relative to the form we would appreciate  
receiving them.

(Testimony of I. C. Rowland.)

With kind regards, we are

Yours very truly,

HANSEN & ROWLAND, INC.  
OF ALASKA

General Agents

/s/ I. C. ROWLAND

I. C. Rowland

Secretary-Treasurer

ICR:ETM

Enc.

Copy to:

C. F. Lytle Company, Sioux City, Iowa.

Lytle & Green, L. C. Smith Bldg., Seattle, Wash.

Federal Works Agency, Public Roads Admins.,  
303 Hoge Building, Seattle, Wash.

Green Construction Company, Masonic Building,  
Des Moines, Iowa.

C. F. Lytle Company and Green Construction  
Company, Attention: Mr. George Roach, Fair-  
banks, Alaska, Slana Highway Division.

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Mr. Peterson: A-3, is a statement of what the policy, by way of a letter, what the policy insures, I assume it is correct, but the policy, of course, is the best evidence of what its terms are, and I do not think Exhibit A-3 adds anything to it, except it pretends to state what the policy contains. I do not think it is admissible, if the Court please, because the policy is here in evidence.

The Court: Whose letter is it? [51]

(Testimony of I. C. Rowland.)

Mr. Peterson: It is a letter addressed to the Federal Works Agency, by I. C. Rowland.

The Court: It is a copy of a letter by the plaintiff?

Mr. Peterson: It is not objected to on the ground it is a copy.

The Court: But, it is written by the plaintiff?

Mr. Peterson: Yes.

The Court: I think I shall admit it.

(Whereupon, letter referred to was then received in evidence and marked Defendants' Exhibit A-3.)

DEFENDANTS' EXHIBIT No. A-3

(Copy)

Hansen & Rowland Inc.

General Agents

Tacoma, Washington

July 30, 1942

Federal Works Agency

Public Roads Administration

303 Hoge Building

Seattle, Washington

Attention: Mr. J. S. Bright

Gentlemen:

Re: Phoenix Indemnity Company Policy No.  
CLP-1750 C. F. Lytle Company, Sioux  
City, Iowa, Green Construction Company,  
Des Moines, Iowa, Etal. Comprehensive  
Liability.

Enclosed herewith you will please find the origi-

(Testimony of I. C. Rowland.)

nal of the above numbered policy, together with invoice for premium, which we are forwarding at the request of Mr. Harvey Rice of C. F. Lytle Company.

This policy insures bodily injury with a limit of \$50,000.00 any one person and \$100,000.00 any number of persons injured in any one accident, automobile property damage liability with a limit of \$5,000.00 each accident, property damage liability other than automobile \$5,000.00 each accident and \$25,000.00 in the aggregate, \$25,000.00 aggregate protective, and \$25,000.00 aggregate contractual.

The policy is written at a flat premium rate of 85 cents per each \$100.00 of payroll and is written on a comprehensive form covering all of the operations of C. F. Lytle Company and/or Green Construction Company and/or Frank & Orville Eblen, Ira Van Buskirk, Gus Ostermann, E. M. Dusenbergl, Inc., Sears Construction Co., J. W. Scothorn Construction Co., Frank Eblen & Hilding Ekdahl, V. L. Lundeen, Inc., Wm. Horrabin Contracting Co., Western Engineering Co., L. Peterson, Weldon Brothers, Duvall & McKinney, J. Leo Hoak, and/or any other associated or affiliated contractors who may be employed by or associated with C. F. Lytle Company and Green Construction Company in the performance of all or any part or division of the construction of approximately 155 miles of Alaska Highway from Slana, Alaska, to Canadian Line. We have attached, under Endorsement #4, a provision that no cancellation shall be effective unless notice has been given to the Insurance Section of the office

(Testimony of I. C. Rowland.)

of the Administrator, Federal Works Agency, Washington, D. C., and to yourself. The policy insures all the operations, wheresoever located, arising out of the contract.

We have attached a certification to the invoice for premium which we trust you will find in proper form.

Should you desire any further information from us in connection with the policy, you may contact us through our Seattle office, Elliot 4757.

Yours very truly,

HANSEN & ROWLAND, INC.

OF ALASKA

General Agents

I. C. ROWLAND

Secretary-Treasurer

ICR:FT

Encs.

Copy to:

C. F. Lytle Company, Sioux City, Iowa.

Green Construction Company, Masonic Building,  
Des Moines, Iowa.

Lytle & Green, L. C. Smith Building, Seattle,  
Washington.

Mr. H. R. Northrup, Care of Insurance Section  
Office of the Administrator, Federal Works Agency,  
North Interior Building, Washington, D. C.

C. F. Lytle Company & Green Construction Com-  
pany Attention: Mr. George Roach, Fairbanks,  
Alaska, Slana Highway Division.

(Testimony of I. C. Rowland.)

Mr. Peterson: No objection to Exhibit A-4, a letter addressed to——

The Court: It will be admitted.

Mr. Peterson: ——the defendant, the Lytle Company.

(Whereupon, letter referred to was then received in evidence and marked Defendants' Exhibit A-4.)

DEFENDANTS' EXHIBIT No. A-4

(Copy)

Hansen and Rowland Inc.

General Agents

Tacoma, Washington

July 30, 1942

Air Mail

C. F. Lytle Company

Sioux City, Iowa

Green Construction Company

Masonic Building

Des Moines, Iowa

Attention: Mr. Harvey Rice of Lytle  
Construction Company

Gentlemen:

Re: Phoenix Indemnity Company Policy No.  
CLP 1750—C. F. Lytle Company, Sioux  
City, Iowa, Green Construction Company,  
Des Moines, Iowa Etal. Comprehensive  
Liability

Enclosed herewith you will please find a copy of  
a letter which we have addressed to Mr. J. S. Bright



(Testimony of I. C. Rowland.)

of the Federal Works Agency, Public Roads Administration, Hoge Building, Seattle, Washington, enclosing the original policy above referred to, as directed by Mr. Rice, and we hand each of you a copy of the policy herewith. We have mailed a copy of the invoice to Mr. Rice, care of the C. F. Lytle Company at Sioux City. We have drawn this contract on the Comprehensive form and we believe you will find that it meets all of the requirements of the Government, and we trust that the same will meet with your approval.

We would appreciate your checking the names of the associated contractors appearing on Endorsement #1, and if there are any omissions or changes please advise us at your earliest convenience.

We have prepared the usual certification on the premium invoice and we have forwarded to Mr. Roach at Fairbanks, Alaska, the forms for declaring payroll, and copy of our transmittal letter is handed you herewith.

You will note that we have incorporated the required provision of the Government whereby the Company waives subrogation against the United States of America, and we have also attached an endorsement relating to notice of cancellation should same be required.

If you find any errors or omissions in the policy as drawn, we would appreciate your advices.

By the delivery of Policy No. CLP 1750 all lia-

(Testimony of I. C. Rowland.)

bility under binder given on July 17, 1942, is hereby terminated and superseded by the said policy.

Yours very truly

HANSEN & ROWLAND, INC.  
OF ALASKA

General Agents

I. C. ROWLAND

Secretary-Treasurer

ICR:FT

Encs.

Copy to:

Lytle and Green, L. C. Smith Building, Seattle, Washington.

C. F. Lytle Company and Green Construction Company. Attention: Mr. George Roach, Fairbanks, Alaska, Slana Highway Division.

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Mr. Peterson: Mind if I interrupt for a moment?

Mr. Sager: With the witness?

Mr. Peterson: If the Court please, I overlooked this morning asking that Mr. Conley, of Portland, be entered as counsel for the plaintiff here. Mr. Conley is a member of the bar of this court.

The Court: The record may show Mr. Conley's appearance for the plaintiff. [52]

Mr. Peterson: J. L. Conley, 905 Porter Building, Portland.

I. C. ROWLAND

resumed the stand for further examination and testified as follows:

Cross Examination—(Resumed)

By Mr. Sager:

Q. Now, Mr. Rowland, well, at the time of this meeting with Mr. Northrup in Seattle, you knew that he represented the Public Roads Administration in the matter of insurance coverage on these various projects, did you not?

A. That was his statement.

Q. And you thereafter saw him in connection with this Lytle and Green policy?

A. Not as to Lytle and Green. Okes Construction Company.

Q. Well, did you discuss with him the Lytle and Green coverage at some later time?

A. Not until about the time of the cancellation, and he discussed it with me.

Q. And where was that?

A. That was in the P. R. A. office in Seattle.

Q. Was that before or after the cancellation?

A. Well, I think it was before the cancellation and I can't establish the definite date.

Q. You saw Mr. Northrup in Washington, D. C. sometime prior to that, did you not?

A. I did, yes.

Q. And Mr. La Rocque was there at that time?

A. Mr. La Rocque was with me in Washington on one trip. I [53] don't remember just which trip it was.

(Testimony of I. C. Rowland.)

Q. Did you see Mr. Northrup?

A. Yes, and that was in connection with the Okes Construction Company.

Q. By the way, who is Mr. La Rocque?

A. Mr. La Rocque was at that time the underwriting manager of the Phoenix Indemnity Company.

Q. In that capacity he had to do with the matter of rates on policies on insurance coverage?

A. Rates, and——

Q. That was his function and duty?

A. Yes.

Q. Well, at this meeting in Washington, was that—do you recall if that was prior to the cancellation of the Lytle and Green contract?

A. Well, I had several meetings I believe, with Mr. Northrup in Washington, and there must have been some meetings prior to the cancellation of the Lytle and Green policy.

Q. Of course, the actual policy itself was not delivered to anybody here until the end of July, isn't that right?

A. You are talking of the Lytle and Green policy?

Q. That is right.

A. I can't tell you without referring to my files, when the policy was delivered.

Q. Well, I am assuming the policies were sent with these letters?

A. They were sent whatever date is on those letters.

(Testimony of I. C. Rowland.)

Q. Those show July 30th, the three different letters. Prior to that time, the policy had never been submitted to [54] either the contractors or any persons representing the government?

A. Not prior to that date, no.

Q. You know on the Lytle and Green coverage that the insurance was ultimately subject to the approval of the insurance section of the P. R. A.?

A. The contract did not say that. The contract recited that the policies had to be approved by the P. R. A. as to form.

Q. What contract do you mean by that?

A. The contract between the contractor and the government. There was no reference in that contract to the insurance section.

Q. At any rate, you knew it was subject to approval by the government?

A. By the P. R. A. All the contracts of that kind are.

Q. You had a copy of this telegram from MacDonald prior to the issuance of the policy?

A. Not prior to the binding of the risk.

Q. No, but prior to the issuance of the actual policy?

A. Prior to the issuance of the actual policy.

Q. Well, this says:

“Pending final information from insurance section of the Federal Works Agency, you are authorized to secure such public liability and property damage insurance as is necessary.”

A. That was not addressed to me.

(Testimony of I. C. Rowland.)

Q. But, you had a copy of that?

A. I had a copy of it.

Q. That was presented to you by Mr. Bright, was it?      A. No, by Mr. Rice. [55]

Q. Yes, Mr. Rice, prior to the time the binder was issued, is that right?

A. No, I can't establish the exact time that I got that. My recollection is that it was given to me at the time, or shortly after I delivered that binder, or the binder was delivered. I can't recall whether I actually delivered the binder or one of my employees, but that telegram was given to me somewhere along there at the time, or after the binder was delivered.

Mr. Peterson: I think none of this examination is proper cross-examination on the case as made by the plaintiff.

The Court: I think that is correct.

Mr. Peterson: We object to that.

Mr. Sager: It seems to me it is proper. They have introduced a telegram to show the authority for the insurance. They have introduced the insurance policy itself. They have introduced the letter and binder letter, and they have introduced the bid letter going for the authority for the issuance of the policy, and that is what all of this has to do with.

Q. Now, at the meeting in Washington, Mr. Rowland, between the time you saw Northrup in Seattle and when the policy was cancelled—strike that.

(Testimony of I. C. Rowland.)

Let me ask you this, didn't you go to Washington and New York very soon after this meeting with Mr. Narthrup in Seattle?

A. I left for St. Paul and New York, I believe the next day or very shortly.

Q. Yes, and on that trip didn't you see Mr. Northrup in [56] Washington? A. I did.

Q. And so that you saw him?

A. It was my recollection that I did. I can't answer——

Q. Within a matter of a couple of weeks after the visit in Seattle?

A. Yes. I can't say the correct date, but I did see him.

Q. Your conference in Seattle was about the latter part of June, am I right about that?

A. I couldn't answer that without referring to my notes.

Q. Now, then, at this meeting in Washington, was Mr. La Rocque there?

A. I can't recall definitely whether he was there at that meeting or whether Mr. Shobinger was there.

Q. Well, wasn't the Lytle and Green coverage mentioned at that time?

Mr. Peterson: Now, if the Court pleases, on this other examination, it seemed to be preliminary. I object to this as not proper cross-examination. He is trying—it probably has a proper place in his—under his affirmative defense, but it certainly is not proper cross-examination here.

(Testimony of I. C. Rowland.)

**The Court:** I think I will let him answer the question and see how much farther the defendant may go. He may answer this question.

(Question read.)

**A.** No rates were discussed. The forms were not discussed, and to my recollection the Lytle and Green contract was not discussed, only the Okes Construction Company. That was the one that all controversy was about. There [57] was no controversy whatever about Lytle and Green at this time.

**Q.** Well, when did the controversy about Lytle and Green start?

**Mr. Peterson:** We object to that on the same ground, if the Court please.

**The Court:** Objection will be overruled.

**Mr. Peterson:** It does not appear that Mr. Northrup had any authority to represent anybody in the matter.

**The Court:** You may answer.

(Question read.)

**A.** Mr. Northrup and Mr. Scadden, Mr. Totten and myself met in Mr. Morris' office in the Hoge Building in Seattle, and that meeting was called for the purpose of discussing—

**Q.** The question was, when, Mr. Rowland?

**A.** I can't give you the exact date.

**Q.** Can you tell us approximately?

**A.** Not without referring to my notes.

**Q.** Can you give us any approximation of the date with respect to when the policy was cancelled?



(Testimony of I. C. Rowland.)

A. Not without referring to my notes.

Q. Well, have you something you can refer to, to help you with that?

A. If I can see that cancellation notice.

Q. You know the policy was cancelled on August 31st?

A. Yes, I say I have to see the cancellation notice to fix the date.

Mr. Peterson: I think we are agreed, Mr. Rowland, that the cancellation was effective on September [58] 1st.

A. September 1st.

Mr. Peterson: 1942.

Q. Now, with respect to that date, can you tell me when this meeting in Seattle was, this second one?

A. It must have been just prior to that date.

Q. And you say Mr. Northrup was present at that time?

A. Mr. Northrup and Mr. Scadden both.

Q. The rates on the policy were discussed at that time?

A. No, they were not discussed, not on Lytle and Green. The Okes Construction Company was.

Q. Wasn't anything said about the Lytle and Green contract at that time?

A. Yes, there was.

Q. Didn't they object to the rate?

A. Not at that time, they did not object to it.

Mr. Peterson: I think this is improper cross-examination. We are suing on an account stated. The only way they can impeach the account——

(Testimony of I. C. Rowland.)

The Court: Sustain the objection to the last question.

Mr. Sager: Allow an exception. I think that is all.

### Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, I want to direct your attention now to Defendants' Exhibit A-4, and calling your attention particularly to the first paragraph of that letter for the purpose of refreshing your recollection, I ask you now [59] at whose request, if anybody's, you delivered a policy to the Federal Works Agency?

A. Mr. Rice of the Lytle and Green Company.

Mr. Peterson: Yes, that is all.

Mr. Sager: No further questions.

By Mr. Peterson (continuing)

Q. Now, will you please—that is Defendants' Exhibit—what is it?           A. A-3.

Q. A-3. You will notice that an invoice is referred to in the communication. I think it is on the first page, Mr. Rowland?           A. Yes.

Q. Will you please state what invoice that was?

A. It must have been the invoice for the deposit premium.

Q. The deposit premium, that is the invoice for \$5,000.00?           A. Yes.

Q. Now, did you render any other invoices to Lytle and Green, other—excepting the five thousand and the sixteen thousand a hundred and fifty-three?

(Testimony of I. C. Rowland.)

A. I couldn't answer that without referring to the file. I can answer as to what our custom is.

Q. Well,——

A. Each month as we get——

Mr. Sager: Just a moment, I don't think his custom is matter that is material here, or competent.

Mr. Peterson: Well, what is your recollection about it, if you are able to——

A. I wouldn't have anything to do with the billing in the interim period. That is done by the [60] accounting board. Normally we send a statement each month as the pay rolls are submitted.

Q. What is the date of the letter you have before you?

A. This is July 30th, 1942.

Q. That was some invoice that—that was some invoice then presented at that time or before?

A. Yes, that would be for the advance deposit premium.

Q. Was there any objection to that invoice made by Lytle and Green, or P.R.A., or anybody else? A. No.

Mr. Peterson: That is all.

#### Recross Examination

By Mr. Sager:

Q. It was never paid?

Mr. Peterson: No, it was never paid.

Q. It was never paid?

A. No, it was never paid.

(Testimony of I. C. Rowland.)

Q. And this invoice of \$5000.00 deposit premium, you mailed that also to the Public Roads Administration?

A. At the direction of Mr. Rice.

Q. And that contains a certificate. I show you this invoice which is Plaintiff's Exhibit 5, Mr. Rowland, and call your attention to the certificate at the bottom of it. What was the purpose of that certificate?

A. It is a certification showing what the charges were.

Q. Well, do you ordinarily put that certificate on every invoice you out?

A. On all construction contracts of this kind we do.

Q. Where the government was paying the bill?  
[61]

A. No, where the government or a private individual was.

Q. Wasn't that certificate required either by Rice or P.R.A. in order to obtain payment through the government?

A. We were not so notified. We attach it because we know it is the custom.

Q. You say that you require this on any contract?

A. On any contract that is a fixed fee contract.

Q. Well, you don't have any fixed fee contracts except for the government, where the government is involved?

A. I beg your pardon, but we certainly do.

(Testimony of I. C. Rowland.)

Q. What is that? A. We do.

Q. And you did not send that invoice or a copy of it to Lytle and Green, did you?

A. Yes, we did.

Q. You did not send that to them, did you?

A. It is billed to Lytle and Green, and the invoice went to Lytle and Green.

Q. What is that?

A. It is billed to Lytle and Green and the invoice went to Lytle and Green.

Q. Didn't you send the invoice to P.R.A.?

A. A copy of it, probably went there, and maybe the original as requested by Mr. Rice.

Q. I am just asking you what the situation was. What you did was to mail the original invoice to the P.R.A. and a copy to Mr. Rice, isn't that correct? Will you examine these two letters and in the first paragraph or two, and see if that is right?

A. It does not say it is the original premium. It says: [62] "Enclosed herewith you will please find the original of the above numbered policy, together with invoice for premium, which we are forwarding at the request of Mr. Harvey Rice."

Q. Now, read the other letter and see what that says with respect to premiums.

A. This says: "Enclosed herewith you will please find a copy of a letter which we have addressed to Mr. J. S. Bright of the Public Works Agency, Public Roads Administration, Hoge Building, Seattle, Wash., enclosing the original policy

(Testimony of I. C. Rowland.)

above referred to, as directed by Mr. Rice, and we hand each of you a copy of the policy herewith. We have mailed a copy of the invoice to Mr. Rice, care of C. F. Lytle Company at Sioux City. We have drawn the contract on the comprehensive form and we believe you will find that it meets all of the requirements of the government, and we trust that the same will meet with your approval."

Q. That is the letter to C. F. Lytle Company?

A. That is addressed to C. F. Lytle Company and Green Construction Company.

Mr. Sager: I think that is all.

#### Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, you were asked about this contract. That is the original contract between the Federal Works Agency and Lytle and Green. When did you first see a copy of that?

A. I can't establish the date. We were provided a copy just before this trial, when I first had an opportunity to read it.

Q. That is what I wanted to get at. When did you first have an opportunity to examine this contract? [63]

A. Just prior to this trial.

Q. And who was that received from?

A. From Mr. Sager.

Q. Through me? A. Through you, yes.

Q. And when did you first see a copy of these unit price contracts?

(Testimony of I. C. Rowland.)

A. At the same time—or, no, after that. I believe that you gave me a copy a few days following that.

Q. And how long ago was that?

A. Oh, it is within—oh, just a couple of weeks or a week.

Mr. Peterson: Yes. Now, I think that is all.

### Recross Examination

By Mr. Sager:

Q. You don't mean to give the impression, Mr. Rowland, that you did not know the government's interest in this contract before you saw the actual contract with the government?

A. I knew the government was awarding these contracts to build the roads, yes.

Q. You knew that the government was interested in the insurance policies?

A. No, they were not named as an assured.

Q. You knew they were interested in the insurance policy?

A. They were not named as an assured.

Q. You mean by that, they did not have any interest in it, or the premium?

A. They were not named as assureds.

Q. You mean, the government was in no way interested in the [64] coverage?

A. They were awarded the contract, but I don't know what the relations were between the government.

Q. You knew that they had an interest in the coverage?

(Testimony of I. C. Rowland.)

A. They had no interest in the coverage, because they were not named as an assured.

Q. You knew they had an interest in it, either the premium or the policy?

A. No, they were not named as assured.

Mr. Peterson: Object.

Q. As a matter of fact, the policy contains two special endorsements referring to the government?

A. Can't be cancelled without giving the government notice. Right of subrogation does not lie against the government.

Q. Those were special endorsements attached to the policy at the direction of whom?

A. Mr. Rice.

Q. So that you knew at least the government had some interest in that policy?

A. They were not named as an assured in the policy.

Mr. Sager: I think that is all.

#### Redirect Examination

By Mr. Peterson:

Q. Now, this cancellation provision in the policy by which the P.R.A. was to be notified of cancellation, I will ask you whether that is usual or unusual in these contracts, either private or public?

A. No, it appears in many contracts, the same provision, where the work is being done under contract for another. [65]

Mr. Peterson: That is all.

The Court: To whom did you look for payment



(Testimony of I. C. Rowland.)  
of the premiums on this contract?

A. Lytle and Green.

The Court: Did you receive any payments on account of it at all?

A. No, sir.

The Court: This item labeled deposit \$5000.00, was that never paid?

A. That was never paid.

The Court: Well, the policy on its face would indicate that there was a payment of that sum made?

A. Yes, it recites a consideration, but the consideration was not paid. The premium was never paid.

The Court: Then, when you submitted this statement as involved here in this litigation, this sixteen thousand some odd dollars, it includes the five thousand dollars?

A. Yes, it does. In other words, in the event that the actual premium under-runs the deposit premium, of course you adjust it in the final——

The Court: That is all.

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Mr. Peterson: Just one question.

Q. In the regular course of your business, how do you bill here, on sixty days or what?

A. I didn't get that.

Q. In the regular course of your business.

Mr. Sager: I don't think that is material.

A. On an account like Lytle and Green, you just bill it.

(Testimony of I. C. Rowland.)

Q. Did you have a practice of billing at any particular [66] period?

A. We sent them a statement every month.

Q. Every month? A. Yes.

Q. Well, is there any practice in transactions of this kind, the company carries the premium sixty days?

Mr. Sager: I object to that.

The Court: He may answer.

A. Yes, we carry those premiums longer than sixty days.

Q. I mean, the general practice?

A. That is the general practice, sixty days is the normal credit period.

Mr. Peterson: That is all.

Mr. Sager: That is all.

(Witness excused.)

Mr. Peterson: Mr. Tinius, take the stand, please.

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EARL TINIOUS,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name to the Court?

A. Earl Tinius.

The Court: How do you spell your last name?

A. T-i-n-i-u-s.

(Testimony of Earl Tinius.)

Q. Mr. Tinius, what is your occupation? [67]

A. Auditor for Hansen & Rowland.

Q. How long have you been auditor there?

A. Three years.

Q. I will ask you whether or not you are a certified accountant?

A. No, sir, I am not, sir, a certified accountant.

Q. Now, as an auditor, are you familiar with premium audits of insurance companies?

A. Yes, I am.

Q. How long have you been in that line of business?

A. Three years I have been with Hansen & Rowland.

Q. I show you Plaintiff's Exhibit No. 10 and ask you if you have seen that before?

A. Yes, I have.

Q. When did it come into your hands first, or if it came into your hands?

A. On the 22nd of September, 1942.

Q. And from whom did you receive it?

A. I got it from Mr. W. E. Corbin, the accountant in the Public Works Administration office in the Hoge Building, in Seattle.

Q. Yes, and just tell the circumstances about your obtaining that. how it came about?

A. Well, I was advised by Mr. Rowland, by his superior, to obtain the pay roll figures for the Lytle and Green policy, C. L. P. 1750, and as it was being cancelled, and they wanted the premium determined up to midnight on August 31st, 1942, I called the

(Testimony of Earl Tinius.)

Seattle office of Lytle and Green and they advised that they had no pay roll record of the Alaska payments, and that the infor- [68] mation could be obtained from the Public Roads Administration office in Seattle, and I called Mr. Corbin and made an appointment for September 21st, and went up and advised him what I wanted. That is, the reimburseable pay roll for the Lytle and Green Construction Company on the 155 miles from the Canadian border to Slana, Alaska, and he advised me it would be a big job to take it from the vouchers that were presented to them for payment, but that they had cards set up on the machine and they would take the payrolls off the machine and let me have a copy of it, and advised me to call back the next day to pick it up, which I did.

Q. And that is the way you came into possession of Exhibit No. 10?      A. Yes, sir.

Mr. Peterson: We offer Exhibit No. 10 in evidence, if the Court please.

Mr. Sager: No objection.

The Court: It will be admitted in evidence.

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

Q. Now, Mr. Tinius, is there any recognized manual for computing short rate premiums?

A. Yes, there is.

Q. Just a minute, now, adopted by insurance writers generally?      A. Yes, there is.

Q. What is the name of that manual?

A. Pay Roll Auditor's Hand Book. [69]

(Testimony of Earl Tinius.)

Q. And have you one with you?

A. I have, sir.

Q. Under—I ask you if the hand book is generally—in general use, and generally employed by pay roll auditors?      A. As far as I know.

Q. And that is issued by what?

A. Issued by the National Bureau of Casualty & Insurance Underwriters.

Q. Yes.

A. It is a recognized national institution.

Q. Now, have you made a calculation as auditor of these various items, the pay roll indicated in Exhibit No. 10 and the three certificates which have been introduced in evidence here which—you are familiar with those, are you, that were furnished by Lytle and Green Company?      A. Yes.

Q. Have you made computations as to the total of the premium?      A. I have.

Q. As of August 31st, 1942?

A. Yes, sir, I have.

Q. State what that is.

A. The total pay roll was \$1,055,214.02.

Q. And what portion of that pertained to the office force of Lytle and Green at Seattle, or——

A. There was \$6,650.90 reimbursable pay roll in the Seattle office.

Q. How much was that?

A. It was \$6,650.90, reimbursable pay roll in the Seattle office of Lytle and Green. [70]

Q. May I see those exhibits, please?

Mr. Peterson: There seems to be a little dis-

(Testimony of Earl Tinius.)

crepancy between the certificate and your figures. I want to inquire about that.

Q. I direct your attention to the second page of Exhibit A-8?      A. Yes.

Q. You will notice that the certificate is in a different amount than you——

A. Well, that is correct, in that they show some of the pay roll as not reimbursable and some of the pay roll was incurred prior to the effective date of the policy.

Q. Oh, well, now, the amount that was connected with that office over there alone was what?

A. \$7,813.23.

Q. Where do you get those figures?

A. That is the total of the Seattle pay roll.

Q. How much?

A. Total of the Seattle pay roll was \$7,813.23, and that portion which was not reimbursable and incurred——

Q. I just wanted to get the reimbursable.

A. The reimbursable is \$6,650.90.

Q. That does not seem to correspond with Mr. La Rocque's certificate. How did you account for the difference between your figures and his?

A. I don't quite understand what you mean.

Q. Well, you look at the bottom of his certificate there, it is \$5,900.00, isn't it?

A. Yes, at the top there is an item of \$1,912.50 that has not been added to the five thousand. [71]

Q. That is all right, then.

(Testimony of Earl Tinius.)

Mr. Peterson: May I have the exhibit back, please?

Mr. Sager: I am willing to stipulate that this \$16,153.73 is the amount claimed—amount prayed for, it is the amount of premium arrived at by virtue of the short rate table on a total pay roll of \$1,055,214.02. I am not conceding that is the proper pay roll or the proper basis, but that is—

Mr. Peterson: There is a bill of particulars, Your Honor, with a photostatic copy of the table attached. I would like to have that in evidence. It is part of the file in this case, to be considered, but I prefer to have it—at least the cancellation table made an exhibit.

The Court: I don't know for sure that I have in mind as to just what you—

Mr. Peterson: Very well.

The Court: You may take it out of the files. If you want it in the record that way, you may do that.

Mr. Peterson: Instead of taking the record apart, I will approach the matter in another way. Thank you.

Q. Mr. Tinius, what was the straight premium, disregarding short rates—straight earned premium?

A. The straight earned premium without regard to short rate was eight thousand, nine hundred and sixty-nine thirty-one.

Q. Then, you apply to that, for the purpose of determining short rate cancellation of premiums, you apply to that [72] what factor?

(Testimony of Earl Tinius.)

A. A factor of 1.801.

Q. That is in accordance with this manual?

A. That is correct.

Q. I show you now Plaintiff's Exhibit No. 16, and ask you whether or not that is a photostatic copy of the page of the manual having reference to this matter? I think you furnished it to me.

A. Yes, that is a photostatic copy.

Q. Yes. Now, what is the practice with respect to carrying forward the decimals and making computations?

A. In computations, particularly in the insurance work, we only carry decimals out to three places, and if the fourth decimal is of—digit is of five or greater, we make the third decimal the next highest amount, but if the fourth decimal is less than five we just drop it.

Q. Did you employ that method in arriving at this short rate cancellation premium?

A. That is right.

Mr. Peterson: Is there any objection to this? We offer in evidence Plaintiff's Exhibit 16, being a photostatic copy of the Underwriters' tables.

The Court: It will be admitted in evidence.

(Whereupon, photostatic copy of Underwriters' tables referred to was then received in evidence and marked Plaintiff's Exhibit No. 16.)

Mr. Peterson: Cross-examine. [73]



(Testimony of Earl Tinius.)

Cross Examination

By Mr. Sager:

Q. Mr. Tinius, I did not get your total pay roll figures exact. I got part of it. Now, will you repeat them?

A. The total pay roll figure was \$1,055,214.02.

Q. And that you computed from these certificates submitted by Mr. La Rocque, together with this long tape, Exhibit 10, it is here, which you got from the P. R. A.?

A. That is right.

Q. The item of \$6,650.90 which you say was the Seattle pay roll of Lytle and Green, is included in the one million fifty-five thousand odd dollars?

A. Yes, that is right.

Mr. Sager: I have no further questions.

Mr. Peterson: I think that is all.

(Witness excused.)

Mr. Peterson: The plaintiff rests, Your Honor.

The Court: You may proceed.

Mr. Sager: Will you take the stand, Mr. Northrup? [74]

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H. R. NORTHRUP,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

(Testimony of H. R. Northrup.)

A. H. R. Northrup.

Q. And what is your present occupation?

A. Chief of the safety and insurance division, Federal Works Agency, Washington, D. C.

Q. How long have you been in that position?

A. That particular title about a year.

Q. What was your occupation?

A. Prior to that, it was chief of the insurance division of the same agency.

Q. The Public Works?

A. Federal Works Agency.

Q. Federal Works Agency. What is the, if any, connection between the Federal Works Agency and the Public Roads Administration?

A. The Public Roads Administration is one of the constituent administrations of the Federal Works Agency.

Q. In 1942, June—in June, 1942, and on, what was your occupation?

A. In June, 1942, on, chief of the insurance section of the Federal Works Agency.

Q. Now what were your duties in that position with respect to insurance coverages on cost-plus contractors with the government? [75]

A. In addition to the cost plus fixed fee projects, we do have certain other problems of bonds, for instance of performance bonds on lump sum contractors, and in some instances the government, contrary to the usual practice, buys insurance for protection of its own properties under the Lenham Act that is permitted, and in other cases where the

(Testimony of H. R. Northrup.)

federal government builds schools and hospitals and other facilities——

Mr. Peterson: This is incompetent, but is it necessary to go into that in this matter—in this case?

Mr. Sager: I think it is probably a little beyond the scope of my question.

The Witness: I am sorry.

Q. With respect to public works, P. R. A. contracts, what were your duties?

A. Oh, we had no insurance problems on P. R. A. contracts, except in connection with cost plus fixed fee contracts.

Q. Well, then, with those contracts, what were your functions?

A. There to see that the contractor got the proper insurance, either that which was authorized by the contracting office or approved by him in a sound insurance carrier, the proper rates and that the coverage itself with the necessary endorsements, was proper.

Q. Were you generally in charge of insurance and allied matters with respect to these contracts?

A. Yes, sir.

Q. Do you know Mr. Rowland?

A. Yes, sir.

Q. When did you first have occasion to meet him? [76]

A. Late in June, 1942.

Q. Where? A. Seattle, Washington.

Q. And how was that meeting brought about?

(Testimony of H. R. Northrup.)

A. I had arrived at the Hungerford Hotel that afternoon. About half an hour after I arrived, Mr. Rowland telephoned me from Tacoma and said he heard that I was coming to town, and would like to talk to me—would like to see me that afternoon, as he was leaving for Boston and New York, so I hadn't yet gotten in touch with the Public Roads people here, and agreed to see Mr. Rowland immediately, and he was over within forty-five minutes with several of his assistants—I have forgotten the names now. He met me at the Hungerford Hotel.

Q. At that time, did you know whether Mr. Rowland had been instrumental in issuing any insurance or coverage—generally speaking, any insurance contracts with the P. R. A. on these contracts?

A. I do not recall that he said that he actually issued any coverage at that particular time, but the purpose of the meeting was to discuss the coverages that would be needed, and the way they should be written.

Q. On which contract?

A. Oh, at that time we discussed, as I recall, the Lytle and Green risk, and the Okes Construction Company. Those are the only two at that time.

Q. At that time did Mr. Rowland's agency have any insurance in force in the Okes contract?

A. I don't recall that he said at that meeting, Mr. Sager, but if I might refresh my memory from

(Testimony of H. R. Northrup.)

a letter written [77] me the next day—might I ask for that question, please?

(Question read.)

A. If this is a proper answer, a day or two later on June 27th, Mr. Rowland wrote me with reference to Lytle and Green and Okes Company in the same letter, and Mr. Rowland stated regarding Okes:

“This company has the contract for the construction of that unit of the Alaska road between Fort St. John and Fort Nelson, British Columbia, and we have bound the Phoenix Indemnity Company of New York in accordance with the Federal Harbor Workers’ Act”——

So that would mean there was a binder out on Okes.

Q. Were you aware of that prior to your meeting with Mr. Rowland?           A. No, sir.

Q. And what was the nature of your discussion with Mr. Rowland at that meeting in Seattle, or what matters did you discuss there generally?

A. Well, Mr. Rowland and his several assistants merely wanted to know the general setup, and what our requirements would be, and I recall that I handed Mr. Rowland several copies—mimiographed copies of what we call our comprehensive insurance rating plan, which is a special plan used by our agency and other departments on cost plus fixed fee contracts where the insurance premium is five thousand dollars or more, and we talked in general

(Testimony of H. R. Northrup.)

terms, and as I recall it, Mr. Rowland said he had these two risks, Lytle and Green and Okes, or was about to get them, and I told him the plan would be required to be [78] used under our setup, being of course, a cost plus fixed fee job.

Q. On these two contracts?

A. Yes, sir, I believe there was a little discussion at the time about equipment insurance, although I can't say for a certainty. Shortly thereafter there was. I said we did not want any insurance on the contractors' equipment. It was a sort of general discussion the first time, and I had not expected to be contacted even by Mr. Rowland, but he called me up and I agreed to a conference.

Q. Now, did you at any later time see Mr. Rowland?

A. Yes, sir. I don't believe of any consequence, but I believe I met him on the street the next day, but we did not go into——

Q. Did you have another conference with him, or meet him?

A. Just—it might have been for a few moments. It was not scheduled.

Q. I mean, at any later time?

A. Oh, following that I would say approximately July 10th, Mr. Rowland came to my office in Washington. When he left here he told me he was going to Boston and New York and would call my office in Washington from New York and see when I would be back, and then come down to

(Testimony of H. R. Northrup.)

Washington, and I was out here a little less than two weeks, flew back, and we had a conference in my office approximately July 10th with Mr. Shobinger and Mr. Groff.

Q. What is the other name?

A. Shobinger, in charge of the claim department of the [79] Phoenix Indemnity Company home office.

Q. At that meeting, what was discussed if anything with respect to this contract, the Lytle and Green insurance?

A. There was some discussion of the 85 cent rate mentioned in the binder. By that time, I had a copy of the binder, and while it did not give any details of the coverage, and I couldn't go into details, the matter of rate naturally stood out, 85 cents, which I considered excessive and we discussed that. That was the only discussion I recall at the time on Lytle and Green.

Q. Now, have you had discussions at any time subsequent to this meeting in Washington with Mr. Rowland, with respect to the Lytle and Green contract?

A. Yes, whenever I came to Seattle, and I was out again the next September, there was some brief discussion. There was some discussion in Mr. Morris' office of the Public Roads Administration, but it was tied in with many other matters, and I don't recall the details, but I know we referred to the 85 cent rate again, and then there was some telephone discussion on a Saturday afternoon about

(Testimony of H. R. Northrup.)

payment of the premium—he wanted to know when the premium was going to be paid.

Q. Who was this telephone conversation with?

A. Mr. Rowland called me in Seattle. I was in Seattle, and I believe he was too, or maybe it was Tacoma—called me at the Public Roads office about the premium of Lytle and Green and Okes. That was after the policy had been cancelled.

Q. Do you recall what was said with respect to the premium?      A. What I said? [80]

Q. Well, what either one of you said?

A. Well, Mr. Rowland wanted to know when the bill was going to be paid and I said that we would have to do something about the rate of 85 cents; that it was excessive in my judgment.

Q. Was that before or after the cancellation?

A. That was after the cancellation.

Q. And that was this telephone conversation?

A. Yes, that was the telephone conversation and also a conversation of a day or two before in Mr. Morris' office.

Q. Did you have the same sort of discussion in the office?

A. Yes, it would always come back to Lytle and Green, when are we going to get the money.

Q. Well, in this meeting at Mr. Morris' office in Seattle, was the matter of the rate discussed at that time?      A. Yes.

Q. Who was present at that meeting?

A. That was in September. Mr. Rowland, and I believe Mr. Miller, some one else from Mr.



(Testimony of H. R. Northrup.)

Rowland's office, Mr. Morris in the Public Roads Administration, and Mr. Scaddon, of San Francisco, and myself. I don't recall any one else.

Q. Who is Mr. Scaddon? What is his connection?

A. Mr. Scaddon is an insurance examiner for the corps of engineers of the War Department, and he is located in San Francisco, and I used him in connection with this work because he was thoroughly familiar with the West Coast conditions, and frequently——

Q. Well, that is sufficient.

Now, this meeting in Seattle in September——

[81]

A. Yes, sir.

Q. Was that before or after the cancellation?

A. After.

Q. Now, did you—by the way, do you know Mr. La Rocque? A. Mr. La Rocque?

Q. Mr. La Rocque. A. Yes.

Q. And who is he?

A. He at that time, when this policy was issued, was superintendent of the liability and compensation department, as I recall it. He is now vice president of the Poenix Indemnity.

Q. And did you have any discussions with him with reference to this Lytle and Green contract?

A. Yes, sir.

Q. When was the first one that you can tell us?

A. If I may refer to correspondence there it would be helpful. I couldn't be sure of these dates,

(Testimony of H. R. Northrup.)

but it is quite evident that on November 17th Mr. La Rocque and Mr. Rowland came to my office in Washington. On November 12th, Mr. La Rocque wrote me confirming a phone conversation, stating that he and Mr. Rowland would be in my office on the 17th, and I recall that there was no change in that. I am pretty sure they were there at that time and we then discussed the Lytle and Green and Okes risks. Mainly, the Okes Construction Company at that time, but as I say, every time we discussed Okes, we brought in the Lytle and Green in some way.

Q. Well, now, generally, what was the discussion with respect to Lytle and Green's contract?

[82]

A. It was always with reference to the rate. We never got much farther, because as the correspondence shows—and I recall the thought we would get the Okes Construction policy out of the way, there was quite a controversy regarding it and the general feeling on the part of all of us was to get rid of that and then we will talk about Lytle and Green, and it was, I believe, in April of '43 when the Okes case was finally adjusted, and then we got into the Lytle and Green in more detail.

There had also been another meeting with Mr. La Rocque and Mr. Rowland in New York. I believe it was early in 1943.

Q. Did you have correspondence with Mr. La

(Testimony of H. R. Northrup.)

Rocque with reference to the Lytle and Green contract?

A. Yes, sir.

Q. Mr. Northrup, handing you Defendants' Exhibit A-5, which contains a number of letters, both originals—some originals and copies, will you examine that and state what it is?

A. Well, the first letter is dated November 24th. It is from Mr. La Rocque, Superintendent of Compensation Liability Department.

Q. First let me ask you this, examine it and tell us if it contains correspondence between you and Mr. La Rocque, either the original or copies, concerning the Lytle and Green contract?

A. Yes, sir, it does.

Q. And I think that is in order—chronological order. What period of time is covered by that correspondence?

A. November 24th, 1942, to August 4th, 1943. It appears to [83] be in chronological order.

Mr. Sager: I offer that in evidence.

Mr. Peterson: If the Court pleases, it appears from the admissions in the answer and the affirmative defense that the alleged mistake, if any, occurred prior to the 30th day of January, 1943, when Mr. Rice wrote the reply to the letter of January 25th, 1943, of Mr. Rowland, a letter which, with the statements and other circumstances constitute the account stated. Any evidence of negotiations carried on by Mr. Northrup, or discussions that he had subsequent to January 30th, 1943, sent to me, are clearly immaterial.

(Testimony of H. R. Northrup.)

The Court: Well, you say all of those letters are subsequent to that date?

Mr. Peterson: No, Your Honor, I do not want to be understood as saying that. There are three or four that are prior to January 30th, and the others, if they are in order, are subsequent to that time. Clearly, they are not admissible to prove a mistake which culminated in this letter of January 30th.

The Court: Of course, without examination of them I cannot tell what they deal with. If they deal with anything that bears on the issue of misapprehension of the facts as alleged by the defendant in its second amended answer and affirmative defense, then it would not matter whether they were prior or subsequent.

Mr. Peterson: I cannot quite follow Your Honor in that, if they were the defendants' statements subsequent to the time.

The Court: They might be self-serving. [84]

Mr. Peterson: That is what I was going to suggest, and this correspondence does not appear to be between the defendants here and Mr. Northrup. They are all of Mr. Northrup's letters to Mr. La Rocque.

Now, the burden I understand these gentlemen have is to prove the mistake on the part of the defendants here, and it seems to me that there is no purpose in encumbering this record by showing writings between third parties here, having no

(Testimony of H. R. Northrup.)

bearing on it—it seems to me no bearing on the question at all. If they were defendants' writings, they would come under the rule of self-serving declarations, but they do not seem to me that the defendants here could show a mistake on his part by introducing in evidence here a letter written by somebody else that did not purport to represent him.

The Court: The plaintiff here, is seeking to maintain this action upon an account stated, but the items that go to make up that account stated are items of liability growing out of the insurance contract, and the insurance contract covers such items as employees of the construction contractors and liability thereunder. The defendant has submitted to the plaintiff his pay roll for such employees, upon which the calculation was based that resulted in the amount here involved being the account stated, according to the theory of the plaintiff and according to the Court's holding. Now, the defendant comes in and says that he was in error in the names that he submitted as employees, and the amounts that were paid to them, and that they were as a matter of fact, not employees at all that would be covered by this contract [85] of insurance, but were employees of the United States government, and such a defense is a proper defense to an account stated.

Mr. Peterson: I do not take any issue with the Court on that.

The Court: Now, then, if these letters bear

(Testimony of H. R. Northrup.)

upon that issue, whether they be prior or subsequent to the time that he wrote this letter that the Court has used as a basis of finding that there was an account stated here, they would be competent, and if they do not, they would be incompetent.

Mr. Peterson: Well, I cannot agree with the Court on that. The letters written subsequently would be self-serving, but none of these letters that are offered were written by the defendants or either of them.

The Court: No, but the defendant might find himself in the position where he has to rest his proof upon some source outside of his own statements or facts.

Mr. Peterson: That is true, but——

The Court: And here he alleges that these employees were employees of the United States Government, and I assume now that the writer of the letters or part of them, is the witness.

Mr. Peterson: Yes.

The Court: And the witness is a representative of an agency of the government that was directly involved in this construction.

Mr. Peterson: Your Honor——

The Court: Likewise involved—not the witness, but the governmental agency, in the contract of insurance [86] by one of the riders. Some reference was made to it.

Mr. Peterson: The effect of plaintiff's pleading is that prior to January 30th, 1943, I made a

(Testimony of H. R. Northrup.)

mistake in reporting these items of pay roll. That is his plea.

Now, we contend that these letters or writings subsequent to that time by the defendant himself would be self-serving declarations. We contend that any writing between—not authorized by the defendant—this is his mistake now that he has to prove. Any letters written by somebody else who were not—was not especially authorized to represent him and speak for him are clearly immaterial. Letters written subsequent to the time he says his mistake was completed. His mistake, if it was made, was made prior to January 30th, 1943, and it must depend on things which occurred prior to that time.

Now, what bearing has the letter of the witness here? We will just take for instance——

The Court: Addressed to the plaintiff?

Mr. Peterson: Yes, addressed to the plaintiff. He refers to Lytle and Green:

“This case is more or less tied up”— This is a letter of February 19th, or rather, this is Mr. La Rocque’s letter:

“This case is more or less tied up with the Okes Construction Company in that both coverages related to the same project but two different sections, and Okes involved compensation, whereas this involves only the comprehensive liability including automobile. We have not had any reply to our letter of January 4th, which in [87] turn followed up earlier letters. There has been no payment of

(Testimony of H. R. Northrup.)

any earned premium to us, although the earned premium on a short rate basis amounts to \$16,153.73, which has been billed to the assured. Short rate cancellation seems to be in order in view of the fact that the policy was not cancelled by the insurer, but rather at the request of the insured after insistence by the P.R.A. that the insured effect cancellation.

“We understand Mr. Scaddon has been trying to communicate with Mr. Rowland on the subject, but as Mr. Rowland is absent from Tacoma and is not expected back for three or four weeks, perhaps we can get together with you on it at the same time we attempt to bring the Okes Construction matter to a conclusion.”

I don't know that there is a reply to that letter. I just don't want to encumber the record with the matter at all, because it encumbers the record for the purpose of an appeal.

The Court: How many of those letters are there?

Mr. Peterson: That are, subsequent to January 30th, there is one, two, three, four, five, six, seven, eight, nine, ten, and they are all between Mr. La Rocque, who stood in the shoes of the plaintiff it is true, and Mr. Northrup. I don't think the contents of them, that any of them seems to be material anywhere. They are discussing the formulas, for instance this letter:

“Dear Mr. La Rocque:”

This refers to both contracts—



(Testimony of H. R. Northrup.)

"Thank you for your letter of April 12th. I expect to be in Washington on Wednesday, April 21st, and [88] shall look forward to seeing you in my office at 11:00 o'clock that morning.

"I had in mind using a rate of \$6.46 for the Okes Construction Company workmen's compensation coverage and I believe from your letter that we should have no difficulty in arriving at something acceptable to all parties concerned.

"With reference to the Lytle and Green Construction Company, I am now awaiting certain additional information from the field which I hope to have by the time we meet in Washington next week.

"Looking forward to seeing you, I am,

"Very truly yours,

"H. R. Northrup."

Can a letter of that kind possibly have any bearing upon a mistake made by the defendant prior to January 30th, 1943?

The Court: Of course, anything in connection with some other contract would have no bearing at all. However, I think I shall have to admit them. I will have to read them all and ascertain if there is anything in them. I shall admit them and allow you an exception.

Mr. Peterson: Very well.

(Whereupon, correspondence referred to was then received in evidence and marked Defendants' Exhibit A-5.)

(Testimony of H. R. Northrup.)

DEFENDANTS' EXHIBIT No. A-5

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue, New York

November 24, 1942

Mr. H. R. Northrup  
Chief, Insurance Section  
Federal Works Agency  
Room 5124  
No. Interior Building  
18th & F Street, N. W.  
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company, etal

In the course of our discussions regarding this policy, as well as the Okes Construction Company Compensation coverage in our office last Saturday morning, it was agreed that we would send you a breakdown of our premium charges. The actual payroll has been \$1,055,214.02 for the period from June 17th to August 31st inclusive that our policy was in force. At our policy rate of 85c, which was for comprehensive coverage, including automobile, and with the Property Damage coverage including blasting, collapse and underground damage, our total earned premium on a pro rata basis would be \$8969.32. Inasmuch as the policy was cancelled at the request of the Assured, not by the Company, and at the time of the cancellation the work was not completed, a short rate cancellation would be

(Testimony of H. R. Northrup.)

in order, and the short rate earned premium would be \$16,153.73.

At the time we first negotiated for this coverage, which was awarded to us strictly on a bid basis, the Manual charges would have aggregated somewhat over \$2.00 in terms of rate. To show what actually happened, we have prepared the following exhibit:

#### MANUAL CHARGES

Actual Exposure	Current Manual Rate	Current Manual Premium
\$1,055,214.02	M & C P. L. .964*	\$10,172.26
	M & C P. D. .998**	10,531.04
120 trucks	Auto B. I. 11.22***	1,346.40
5 Passenger Cars	Auto B. I. 4.70***	23.50
	Auto P. D. 1.85****	9.25
Total Manual Premium .....		\$23,007.65
Short Rate Factor .....		1.801
Short Rate Earned Premium .....		\$41,436.77

\* Based on Washington Manual rate Code 3450 increased for 50/100 limits.

\*\* Based on Washington Manual rate Code 3450 increased for 5/25 limits excluding blasting, collapse and underground damage.

\*\*\* Based on annual rate of \$54.61 per unit for trucks, \$22.86 per unit for passenger cars, 50/100 limits pro rata.

\*\*\*\* Based on annual charges of \$37.50 per truck, \$9.00 per passenger car, for \$5000 limit pro rata.

Even without including any loading for blasting, collapse and underground damage coverage, and making no allowance for possible exposure with respect to sublet work or other "unknown" hazards, the average Manual rate figures out to

(Testimony of H. R. Northrup.)

\$2.18 for the pro rata premium of \$23007.65 detailed above as compared with our charge of 85c, including blasting, collapse and underground damage in the P.D. Our 85c by the way is broken down as follows:

Actual Payroll	Element in Policy Rate	Policy Premium
\$1,055,214.02	M. & C. P. L. .50	\$ 5276.07
	M. & C. P. D. .25	2638.04
	Auto P. L. .08	844.17
—	Auto P. D. .02	211.04
	Total .85	\$ 8969.32

It seems to us that there is quite a favorable comparison with Manual rates in the charge provided for under our policy. We do not think that anyone will hold that our rate was unreasonable in spite of rates that may have been used by any other company in replacing our coverage after our policy was cancelled at the Assured's request.

If we can work out a satisfactory solution to the problem of the Okes Construction Company, we believe that both we and Mr. Rowland will be perfectly willing to adjust the Lytle and Green policy on a pro rata basis in spite of its having been cancelled at the request of the Assured, the request having been brought about by Mr. Scadden.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:md

(Testimony of H. R. Northrup.)

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

J. M. Haines, President

H. Lloyd Jones, Vice President

V. B. Chittenden, Vice President

C. R. Newhouse, Vice President

J. R. Robinson, Vice President

J. F. Cunningham, Secretary and Treasurer

D. W. LaRocque

Supt. Compensation & Liability Dept.

December 16, 1942

Mr. H. R. Northrup

Chief, Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th & F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company, et al Alcan Highway

Under date of November 24th I wrote you complying with your request for a breakdown of the manual premiums that would normally have applied for the exposures of this risk at the time we carried it, and the premium actually developed under our overall average rate for the comprehensive policy, which included automobiles. Our prem-

(Testimony of H. R. Northrup.)

ium was less than 40% of the developed manual premium on the same exposures. In other words, we discounted our rates considerably more than 50% so that our charge of 85% per \$100 of payroll does not seem at all out of line. We would appreciate your comments. We are anxious to get our earned premium settled out by the end of the year if possible.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 646935 Dec 18 '42.

[Letterhead Phoenix Indemnity Company]

January 4, 1943

Mr. H. R. Northrup  
Chief, Insurance Section  
Federal Works Agency  
Room 5124  
No. Interior Building  
18th & F Streets, N. W.  
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company, etal Alcan Highway

Please refer to our letters of December 16th and  
November 24th and let us have your comments re-

(Testimony of H. R. Northrup.)

garding the current premium under this policy to the date of cancellation, August 31st.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 649922 Jan 5 '43.

February 19, 1943

Mr. D. W. LaRocque, Superintendent  
Compensation and Liability Department  
Phoenix Indemnity Company  
55 Fifth Avenue  
New York, New York

Re: Alaska Highway

Dear Mr. LaRocque:

I am leaving here for Canada and the west coast tonight to discuss a number of problems in connection with the Alaska Highway project, and immediately following my return to Washington within a week or ten days will be in a position to suggest a rate for the coverage provided by your company. I do not believe there will be any difficulty in your company and this office reaching an agreement as to a fair and adequate rate under the Comprehensive Insurance Rating Plan.

I expect to be in Seattle the latter part of next week and will get in touch with Mr. Rowland while there to learn if he can add anything to the information we already have. I am sure you would

(Testimony of H. R. Northrup.)

wish me to contact Mr. Rowland while on the west coast.

Trusting that this matter will be disposed of to the satisfaction of all concerned at a very early date, I am

Very truly yours,

H. R. NORTHROP

Chief, Insurance Section

Copy to: Mr. I. C. Rowland

HRN/kdl

[Letterhead Phoenix Indemnity Company]

February 19, 1943

Mr. H. R. Northrup  
Chief, Insurance Section  
Federal Works Agency  
Room 5124  
No. Interior Building  
18th & F Streets, N. W.  
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company Alcan Highway

This case is more or less tied up with the Okes Construction Company in that both coverages related to the same project but two different sections, and Okes involved Compensation, whereas this involves only the Comprehensive Liability including Automobile. We have not had any reply to our letter of January 4th, which in turn followed



(Testimony of H. R. Northrup.)

up earlier letters. There has been no payment of any earned premium to us, although the earned premium on a short rate basis amounts to \$16,-153.73, which has been billed to the Assured. Short rate cancellation seems to be in order in view of the fact that the policy was not cancelled by the Insurer, but rather at the request of the Insured after insistence by the P.R.A. that the Insured effect cancellation.

We understand Mr. Scaddon has been trying to communicate with Mr. Rowland on the subject, but as Mr. Rowland is absent from Tacoma and is not expected back for three or four weeks, perhaps we can get together with you on it at the same time we attempt to bring the Okes Construction matter to a conclusion.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 666195 Feb 20 '43

(Testimony of H. R. Northrup.)

[Letterhead of Phoenix Indemnity Company]

March 9, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th & F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: C-161550 Oakes Construction Co. etal.

CLP-1750—Lytle & Green Construction

Co. Alcan Highway

On February 19th you informed us that you were leaving for the West Coast but would be back in about a week or ten days. At that time you expected to be in a position to discuss with us the question of rate under the Okes Construction policy and the payment of premium under both of these policies. Incidentally, as the Lytle & Green risk now stands, it has been cancelled short rate on our records and the earned premium amounting to \$16,-153.73 remains unpaid.

I hope by now you have returned and are in a position to discuss these two risks. I would appreciate hearing from you. If it is necessary that I go to Washington to make a last attempt to straighten things out, I will do so upon hearing from you. On the other hand, you may be making plans to come to New York on other business in

(Testimony of H. R. Northrup.)

the near future, and we could then get together here.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 670734 Mar 11 '43.

[Letterhead of Phoenix Indemnity Company]

April 12, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Room 5124

No. Interior Building

18th and F Streets, N. W.

Washington, D. C.

Dear Mr. Northrup:

Re: C-161550—Okes Construction Company,  
etal. CLP-1750—Lytle & Green Construc-  
tion Co. Alcan Highway

Since our phone conversation of the other day, I have re-figured this on the basis of the tentative proposal you advanced of a \$6.00 rate, with the War Risk Plan applied. Your figure of a standard premium was \$59,212, and you had also thought that that would develop an actual premium within the maximum. I am wondering if in working that up you overlooked the estimated allocated loss expense of \$4000. Using a \$6.00 rate, our computations would be as follows:

## (Testimony of H. R. Northrup.)

	Actual Payroll .....	\$984,050.00
6.46*	Proposed Overall Rate .....	6.00
63,569.63*	Proposed Standard Premium .....	59,043.00✓
57,212.67*	90% of Standard Premium .....	53,138.70✓
	Fixed Charge (17.9%) .....	9,511.83✓
	Actual Incurred Losses (excluding allocated loss expense).....	40,947.00
	Loss Conversion Factor .....	1.12
	Converted Losses .....	45,860.64
	Estimated Allocated Loss Expense....	4,000.00
	Total Losses Includable .....	49,860.64
	Indicated Premium .....	53,372.47
	Maximum Premium .....	53,138.70
	Tax Factor .....	1.029

\* Marginal notation in pencil.

Applying the tax factor to the actual indicated premium, we arrive at \$61,094.27. Applying the tax factor to the maximum of 90% of the proposed standard standard premium, we get \$54,679.72.

I suggested in the course of our phone conversation that you consider approving a higher rate but with a lesser fixed charge percentage-wise that will result in our getting no more than \$9511.83. I would at least suggest that you consider approving a rate high enough to keep our indicated premium within the maximum, and then I think we can reach some agreement quickly.

As far as Mr. Rowland is concerned, a standard premium of \$59,043, would give him as an advisor's fee, to be paid separately and directly by the F.W.A., \$2412.77. This is based on 7½% of the first \$10,000, 4% of the next \$40,000, and 2% of the remaining \$3138.70. If a standard premium higher than \$59,043 is agreed upon, the advisor's

(Testimony of H. R. Northrup.)

fee will be of course proportionately higher, and I hope that we can work that out with Mr. Rowland. The main stumbling block seems to be to get approved a rate that will give us a developed premium within the maximum.

I will arrange to be in your office on Wednesday, April 21st, for further discussion of this matter in the hopes that we can come to a definite agreement at that time. I am sure we will be able to work out something that is acceptable all around. Unless I hear from you to the contrary, therefore, I will be in your office at say 11:00 A.M. next Wednesday, April 21st. Would you mind confirming it so that I will be sure that you will be there?

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamp]: 678621 Apr 14 '43.

(Testimony of H. R. Northrup.)

[Letterhead of Phoenix Indemnity Company]

March 25, 1943

Mr. H. R. Northrup, Chief  
Insurance Section  
Federal Works Agency  
Room 5124  
No. Interior Building  
18th & F Streets, N. W.  
Washington, D. C.

Dear Mr. Northrup:

Re: C-161550 — Okes Construction Company,  
etal. CLP-1750—Lytle & Green Construc-  
tion Co. Alcan Highway

We have not heard from you since our letter of  
March 9th, and are wondering if you are yet in a  
position to discuss with us the question of rate  
and premium collection under these policies.

Very truly yours,

D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Stamped]: 674285 Mar 26 '43.

(Testimony of H. R. Northrup.)

April 14, 1943

Mr. D. W. LaRocque, Superintendent  
Compensation and Liability Department  
Phoenix Indemnity Company  
55 Fifth Avenue  
New York, New York

Re: C-161550—Oakes Construction Co. etal.  
CLP-1750 — Lytle & Green Construction  
Co. Alaska Highway

Dear Mr. LaRocque:

Thank you for your letter of April 12. I expect to be in Washington on Wednesday, April 21, and shall look forward to seeing you in my office at 11 o'clock that morning.

I had in mind using a rate of \$6.46 for the Okes Construction Company workmen's compensation coverage, and I believe from your letter that we should have no difficulty in arriving at something acceptable to all parties concerned.

With reference to the Lytle & Green Construction Company, I am now awaiting certain additional information from the field which I hope to have by the time we meet in Washington next week.

Looking forward to seeing you, I am

Very truly yours,

H. R. NORTHROP

Chief, Insurance Section

HRN/kdl

(Testimony of H. R. Northrup.)

April 30, 1943

Mr. D. W. LaRocque, Superintendent  
Compensation Liability Department  
Phoenix Indemnity Company  
55 Fifth Avenue  
New York, New York

Re: Lytle and Green Construction Company  
—Alaska Highway

Dear Mr. LaRocque:

When you were in my office last week I stated I was securing the actual payrolls of the above for the period from June 17, 1942 to August 31, 1942. This information has now been received and I find the Public Roads Administration records show that the total payroll for the period referred to amounted to \$3,745.00, so, it is evident there is some error in your records showing a payroll of \$1,055,214.02.

We will appreciate any further information you can give so that this matter may be disposed of. I am sending a copy of this letter to Mr. Rowland and might add that I expect to be in Seattle within a few weeks, going there by way of Edmonton, the Highway headquarters for Public Roads Administration. If desired, I will be glad to discuss the matter with Mr. Rowland when in Seattle and if there are any points in question, to take them up while in Edmonton. So, if there is any ques-



(Testimony of H. R. Northrup.)

tion as to the correct payroll I will appreciate hearing from you or Mr. Rowland.

Yours very truly,

H. R. NORTHRUP

Chief, Insurance Section

HRN:lms

cc: Mr. Rowland

Hansen and Rowland, Inc.

Tacoma, Washington

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

June 8, 1943

Mr. H. R. Northrup, Chief

Insurance Section

Federal Works Agency

Rm. 5124 No. Interior Bldg.

Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company. Alcan Highway

You will recall this case that we discussed when the writer was in your office about six weeks ago. Our Comprehensive Liability policy had been in force from June 17th to August 31, 1942, and our audit had developed a payroll of \$1,055,214.02. However, you had been furnished information to the effect that the payroll for that period amounted to only \$3745. We have in our files certified copies

(Testimony of H. R. Northrup.)

of payroll statements from the Assured, and we also have a photostatic copy of a recording machine tape secured from the Seattle office of the Public Roads Administration, showing payrolls for part of that period, which tie in with the amounts that had previously been given our auditor. These payroll records seem to represent items that were reimbursed to Lytle & Green as payroll by the Public Roads Administration. The records were prepared by Government auditors. This particular part of our file covers the period from June 17th to July 15th, during which time the payroll amounted to \$309,821.42. Altogether, our re-check discloses the same payroll of \$1,055,214.02 as was previously reported to us.

There seems to be no doubt but that these were actually Lytle & Green's payrolls. You may have had a chance to look into this question while you were out West on your recent visit, and we would like very much to have your early advices.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

(Testimony of H. R. Northrup.)

Copy /db

July 9, 1943

Mr. D. W. LaRocque, Superintendent  
Compensation & Liability Department  
Phoenix Indemnity Company  
55 Fifth Avenue  
New York, New York

Re: CLP-1750 — Lytle & Green Construction  
Company. Alaska Highway

Dear Mr. LaRocque:

The question of payroll for the above referred to in your letter of June 8 is still being investigated. The only records we have show that the payroll of this concern under the above policy amounted to \$3,745, and apparently any amount in excess of that was reported in error.

As stated, the matter is being given further attention, and if not disposed of within the next two weeks, I will have an opportunity of discussing it personally with the contractor's representatives and Public Roads Administration representatives at the scene of operations as I expect to be at the scene in about two weeks. In the meantime, rest assured that we will do everything possible to satisfactorily dispose of the question of premium due for the time your company covered this risk.

Very truly yours,

H. R. NORTHRUP,

Chief, Insurance Section.

HRN/kdl

(Testimony of H. R. Northrup.)

PHOENIX INDEMNITY COMPANY

55 Fifth Avenue

New York

August 4, 1943

Mr. H. R. Northrup, Chief  
Insurance Section  
Federal Works Agency  
Rm. 5124 No. Interior Building  
Washington, D. C.

Dear Mr. Northrup:

Re: CLP-1750 — Lytle & Green Construction  
Company

We have had no further word from you since your letter of July 9th in which you stated that you expected to discuss this mix-up personally with the contractor's representatives and the Public Roads Administration at the scene of operations sometime during the latter part of last month. Meanwhile, it has occurred to us that perhaps your figure of \$3,745, which you claim represents the entire payroll that should be used for premium computation under our policy is only the payroll for Lytle & Green, the general contractors. That still does not agree with our own records of Lytle & Green's payrolls, but, aside from that, the fact remains that our policy covered an imposing list of associate and sub-contractors, the aggregate payrolls for which amounted to the figure of \$1,055,-214.02, on which we base our claim for premium, and incidentally, on a short rate basis inasmuch as

(Testimony of H. R. Northrup.)

this was not cancelled by us but instead at the Assured's request upon the insistence of Mr. Scadden.

Lytle & Green's payroll for the last two weeks of July, 1942 alone amounted to \$12,281.53, and for other periods during the time our policy was in force varied in amount from a few hundred dollars to as much as \$10,000 or \$11,000 each period. That is just for Lytle & Green payroll, not the payroll of the various other associate and subcontractors specifically covered by name and reference in our policy. Lytle & Green's payroll for the total period of our policy coverage was approximately \$58,000. You have the complete breakdown, which I left with you, and we have certified copies of the various payroll statements for the different periods, in our files.

We would appreciate your letting us know where the matter stands at present.

Very truly yours,

/s/ D. W. LA ROCQUE

Supt. Comp. & Liab. Dept.

DL:MD

[Endorsed]: Filed Sept. 6, 1944.

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The Court: I think we will take an intermission now for fifteen minutes.

(Recess.) [89]

The Court: You may proceed.

Q. Mr. Northrup, can you tell us about when it came to your attention that this pay roll was the

(Testimony of H. R. Northrup.)

pay roll of Civil Service appointees paid by Government check?      A. In late February, 1943.

Q. Now, during the period covered by this correspondence between you and Mr. La Rocque, with respect to Lytle and Green coverage, what were you negotiating about, or discussing?

A. The rate and the premium produced by the——

Q. On the Lytle and Green insurance?

A. Yes, sir.

Q. At the time of the cancellation of the Lytle and Green contract, was there some other coverage put on?      A. Yes, sir.

Q. And what was the rate under that coverage?

A. It started at seven and one-half cents per \$100.00 of pay roll, but later it was changed to four cents, as of the inception date of the policy—four cents per \$100.00 of pay roll.

Mr. Sager: You may inquire.

### Cross Examination

By Mr. Peterson:

Q. On this other insurance that was placed by the General Casualty Company of America—the United, rather——

A. United Pacific Insurance Company of Tacoma, here.

Q. And that was the public liability and property damage you are referring to?

A. Public liability and property damage caused by automobiles. [90] No other property damage.

(Testimony of H. R. Northrup.)

Q. It was limited to property damage caused by automobiles? A. Yes, sir.

Q. That was at seven and a half cents?

A. At the beginning, and later changed.

Q. And against eight and a half cents on the Phoenix? A. Eight five oh on the Phoenix.

Q. Do I understand it was seven and a half or seventy-five? A. Seven and a half cents.

Q. Well, the United Pacific took over all contracts, all the insurance up there, did they?

A. Yes, sir, eventually.

Q. Now, that seven and a half cent rate was based on the pay roll?

A. Yes, it applied for \$100.00 of pay roll.

Q. That included men working out on the job, and mechanics, truck drivers and so on?

A. Yes, sir, but only for public liability hazard.

Q. I understand, only for public liability, so that that was just an extension of this coverage of the Phoenix, at a lesser rate?

A. That is correct, yes, sir.

Mr. Peterson: Yes.

The Court: Let me ask here, were those Civil Service employees, the ones you designated Civil Service employees, did it cover them?

A. No, sir. I might explain, Your Honor, that the same error was made. A pay roll was reported to the United Pacific when they first took this coverage over,—pay roll on Civil Service employees, but when that was [91] discovered a credit memorandum was issued and we paid only at the four

(Testimony of H. R. Northrup.)

cent rate by that time on the actual Lytle and Green pay roll, and eliminated all federal government employees.

Q. Well, now, the four cent rate, when was that put into effect?

A. I don't recall the exact date. I could dig it out if you wish, but it was dated back to the inception date of the policy.

Q. Well, and then did you pay a premium based on the four cent rate on the employees on the pay roll?

A. Only the pay roll of Lytle and Green. We only on the pay roll of Lytle and Green at all times.

Q. Did you cover the other contractors?

A. No, sir, the government cannot—on the other contractors, yes, sir.

Q. The policy—

A. When I say Lytle and Green, I do not want to mislead. I mean by that Lytle and Green and all associated contracts.

Q. And that is what I wanted to get at, and that was the four cent rate was paid on those, is that correct?

A. Yes, sir.

Q. And that was the pick-and-shovel men, tractor men, graders and machine operators, and some on automobile operators?

A. I don't believe there were any such, the strictly contractors' employees, either Lytle and Green, or Oslin and others were more in the managerial capacity. All of the laborers and tractor



(Testimony of H. R. Northrup.)

operators and so forth were [92] federal government employees.

Q. That federal government business, that is your term, they were these men signed up for Civil Service because the government could not pay them direct. That was the reason?

A. I don't know the reason.

Q. That was abandoned?

A. At the end of the 1942 season.

Q. A man getting a job up there didn't have to sign up for this Civil Service business any longer?

A. That is correct.

Q. And they continued on. There wasn't any change in the arrangements up there, as far as that was concerned after 1942, in carrying on the work?

A. Well, except that they were an entirely different type of employee. They were no longer Civil Service employees. They became contractors' employees, Okes, and——

Q. And you paid on the pay roll these men received? A. Yes.

Q. And that included the man who was working pick and shovel, and driving trucks and so on?

A. Yes, the second season.

Q. And the work was carried on the same way after '42 as it was before '42, isn't that a fact? I mean, the actual doing of the work?

A. Well, now, I must say that I was not up along the line of the highway, but from an insurance standpoint there was quite a difference.

(Testimony of H. R. Northrup.)

Q. Well, you don't know whether there was any change in the manner and method of doing the work after '42 as prevailed [93] before?

A. I have no knowledge of that.

Q. You don't know anything about that, but you did have coverage for the negligent accidents and omissions of any of these workmen on the job after '42 from the United Pacific Casualty Insurance Company?

A. Yes, sir.

Mr. Peterson: I think that is all.

The Court: Well, in 1942, the various employees, common laborers and others, received their pay from whom?

A. The federal government.

The Court: Payment was made direct by the federal government the same as it would to any other Civil Service employee?

A. Yes, sir.

The Court: And Civil Service deductions were made, and Civil Service rights were in existence?

A. I am not thoroughly familiar with that. I think Mr. Sager may have some one that can testify, but I am inclined to believe that the usual five per cent deductions were not made, because these were different types of Civil Service time, the regulars that retired, certain others for war emergency, other—I am not certain what it is called, a temporary basis, laborers and so forth.

The Court: Who employed these laborers in '42?

A. Representatives of the federal government, necessarily. No one but a federal government [94]

(Testimony of H. R. Northrup.)

representative could employ a Civil Service employee.

The Court: Who could discharge them?

A. A representative of the federal government.

The Court: Did they have the same rights of any other Civil Service employee with regard to a discharge hearing, and——

A. I don't know. They got annual leave and the like, the same as others. I believe Mr. Sager will have some one that can give more information.

Mr. Sager: I think probably Mr. Northrup is not too familiar with that. We have a witness who is.

The Court: That is all.

By Mr. Peterson (Continuing):

Q. The coverage, I understand, of the United Pacific, was not as broad as the Phoenix?

A. Oh, it did not include property damage other than automobile, but that is one of the things that I would have ironed out with the Phoenix if we had ever settled this thing and suit had not been filed, because I had a similar situation on another company. We don't want property damage insurance. In fact, there was no hazard.

Q. It was not as broad coverage as the Phoenix had provided?

A. No, a very slight difference.

Q. Now, pay checks, after the Civil Service proposition was abandoned, was made direct—it was made by the government direct to the workmen?

A. I believe so, as a matter of convenience.

(Testimony of H. R. Northrup.)

Q. Well, it was a matter of convenience before, wasn't it, as far as you knew there wasn't any change in the method [95] of paying the men after Civil Service was abandoned as there was before? They got their checks right through to the completion of the job right from the government direct?

A. That is true, but to give you the proper picture I think I should say—

Q. I am not asking for a picture. I am asking for facts.

Mr. Sager: He is entitled to explain his answer.

Mr. Peterson: It does not seem to me the answer calls for an explanation.

The Court: If you have any more to say, you can.

A. I was merely going to point out that paying direct was the general practice followed in connection with all the contractors. We paid the insurance company cost direct for the contractors' insurance, purely as a matter of convenience.

The Court: Well, you mean if there had not been a dispute arisen here, the premium here would have been paid by government check?

A. Undoubtedly, yes, sir.

The Court: Upon the certificate of the assured?

A. I believe there was a certificate involved, yes, sir. Well, he would have to say he had the coverage. We knew we handled all of that, and the assured had very little to do with it.

(Testimony of H. R. Northrup.)

Mr. Peterson: I think the matter of payment is covered by the contract itself, Your Honor. The contract [96] provides that the contractor——

The Court: It does not. The contract provides the assured is liable.

Mr. Peterson: Yes. And the government at its option may pay direct.

Mr. Sager: That is not a provision of the insurance contract. That is a provision of the construction contract. I will put it in evidence later.

The Court: I was looking at the insurance contract. I did not find anything in the insurance contract which made the government liable for premiums.

Mr. Peterson: No, Your Honor. That is all.

#### Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, I want to get straightened out the situation with this premium on the later coverage that was with United Pacific Insurance.

A. That is correct.

Q. That took effect at the same time this was cancelled? A. The minute it was cancelled.

Q. Or the premiums with Phoenix were cancelled, and originally, do I understand, the premium was at the rate of seven and a half cents a hundred dollars of pay roll?

A. The policy was written showing that rate.

Q. And it was later reduced to four cents a hundred dollars? A. Yes.

Q. Now, then, you stated in submitting the pay

(Testimony of H. R. Northrup.)

roll to the United Pacific, that the same error was made as with Lytle and Green, and that they reported the entire pay [97] roll, whether they were Civil Service employees or not?      A. Yes, sir.

Q. And when that fact was discovered, that was changed, a refund or a credit or something was allowed upon the premiums charged?      A. Correct.

Q. And under the revised premium, it covered only those paid by the contractors and not by government check?      A. That is correct.

Q. At least it covered only those not under Civil Service?

A. Yes, we did not pay for any under Civil Service.

Q. So that the premium which had been computed up to that time and which was based upon the pay roll of Civil Service employees, was remitted, or a credit was allowed for it and the premium was not paid upon those Civil Service employees?      A. That is correct.

The Court: That is, for the year 1942?

A. Yes, sir.

The Court: And then there was a change in the method of operation for the year 1943?

A. Yes, sir, '43 they went on a contractor's pay roll, just like all the others had been.

Q. Well, Mr. Northrup, isn't it a fact with respect to Lytle and Green, that they were not removed from Civil Service until some time after the first of the year, or do you know?

(Testimony of H. R. Northrup.)

A. It is my understanding that at the beginning of the second season, all employees rehired for the second season, were hired by Lytle and Green and put on Lytle and [98] Green's pay roll. Now, there was a definite break there when winter came on for the majority of the employees. When they came back the next season they went on Lytle and Green's pay roll. There was a few carried through the winter, just when the change was made I am not certain, but the first of the year or February 1st of '43.

Mr. Sager: I think that is all.

#### Recross Examination

By Mr. Peterson:

Q. Who hired the men employed by Lytle and Green, unit contractors, beginning with June 17th, 1942?

A. I don't know of my own knowledge. I have heard.

Q. Now, I think in answer to a question by the Court, you indicated that there was some change in the operation. What did you mean by that, any change in carrying on the work, any change on who directed the men to do their respective jobs?

A. I don't recall saying there was any change in the operations. Do you refer to my statement that in the next year, the second season, these employees were handled the same as had been handled, all other contractors' employees? I made that statement.

(Testimony of H. R. Northrup.)

Q. I am not clear yet as to what happened in '43, when you invoked, inaugurated four cent rate in '43, and the Civil Service proposition was discontinued, then what did the contractors pay on so far as pay roll was concerned?

A. After they ceased to be Civil Service employees?

Q. Yes. [99]

A. We paid the four cent rate on the entire pay roll.

Q. On the entire pay roll, so there is no misunderstanding about that, now, that is on the pick-and-shovel men, and everybody who worked on the job? A. That is correct.

Q. That is correct? A. Yes, sir.

Q. Now, this policy is what they call a comprehensive, that the United Pacific issued,—is what they call a comprehensive rating plan coverage?

A. Yes, sir. We should not get confused here. The comprehensive liability policy and the comprehensive rating plan of the Federal Agency—we do have all of the coverage of the United under your comprehensive rating insurance plan.

Q. Now, tell us just briefly. I will ask another question first. The United Pacific was under the comprehensive rating plan, is that correct?

A. Yes, sir.

Q. Will you tell the Court very briefly how that differs in the mechanics of the thing from the policy which the Phoenix issued in this case?

A. It results in the government paying a prem-



(Testimony of H. R. Northrup.)

ium amounting to the losses actually paid to the men there or their widows, or to the public that might have been injured, plus a factor for the claim department's service of the insurance carrier, plus certain fees to the insurance carrier for writing the policy, making inspections—things of that sort, and in some instances a fee to an advisor. When we get all through, we take the money paid [100] out and add to that reserved for future payments in the case of a case in controversy in court, or something of that sort, and total it all up—add these various factors of expense, and that is our cost.

Now, for convenience, we have started off in writing the policy at a certain rate, and we pay the insurance carrier a premium—a deposit premium of fifteen per cent of what the estimated premium is. That is, at the inception of the policy. Then, as the pay roll reports come in every month from the contractor, we multiply the actual pay roll by the rate shown on the policy and pay the insurance carrier fifty per cent of that, so when the job is done if the estimated pay roll is exactly right, and it is never, the insurance carrier would have received sixty-five per cent of the premium shown in the rate in the policy, and we start adjusting if that is more money than they received, we pay the difference, however not to exceed ninety per cent of the premium produced by the rate shown on the policy.

(Testimony of H. R. Northrup.)

Q. Now, on that plan—that comprehensive rating plan really is writing insurance on the cost plus proposition, isn't it?

A. I think that is a good description.

Q. It means that you, for instance, you have a comprehensive policy—a policy under the comprehensive plan, and you had a loss up in Dawson Creek for instance, and——

A. We did not have that. It was the War Department.

Q. You knew of it, however?

A. Yes. [101]

Q. A barge loss. We will say a loss occurred where you had a comprehensive policy, so we will get it clear, and it amounts to \$100,000.00, like the Dawson Creek loss. Now, exactly how is that proposition handled? Who pays out the money first to the man who got injured, who suffered the loss?

A. The insurance company pays the man or his widow, or the outside public, if it happened to be public, and make monthly reports.

Q. They pay that out now? A. Yes.

Q. And at the end of the month, what do they do? A. They make quarterly reports.

Q. At the end of the period?

A. Yes, sir, they make reports—term reports to the federal department concerned, Federal Works Agency, or War Department. All government departments use the same plan, and frankly we do not pay a lot of attention to those quarterly

(Testimony of H. R. Northrup.)

reports, because I have cases right now where the reserves are entirely too high on some outstanding cases. It is not costing the government any money in making the preliminary adjustment after the job is completed, and more particularly making the final adjustment is where we are vitally concerned of the costs made by the carrier. We scrutinize to see they have not put in any fictitious cases or reserves.

Q. I want to get to the \$100,000.00 the company paid out on this assumed loss? A. Yes.

Q. When does it get its money back on that? Does it get [102] the money back from the government?

A. You have to be a little more specific, I think, Mr. Peterson. That carrier would have collected the premium as it went along. Now, if the job were completed we will say they would have collected 65 per cent, approximately of the premium shown on the policy.

Let's assume that that premium would total \$100,000.00,—the pay roll times \$100,000.00 and your loss in this case, we will assume, was \$100,000.00. The carrier, if everything worked smoothly, would have received \$65,000.00,—do you follow me, or 65 per cent. Now, then, when the final adjustment was made, if the War Department in that case was satisfied that the \$100,000.00 was actually spent——

Q. Yes.

A. They would pay the insurance carrier the

(Testimony of H. R. Northrup.)

difference between the \$65,000.00 already paid and \$90,000.00 which is the top limit of our liability for premium.

Q. Yes.

A. We have a 90 per cent limit. And anything above that the carrier stands.

Q. Let's reduce that situation down to \$50,000.00. Does the ten per cent differential still apply? A. Oh, yes.

Q. If I understand you correctly, premiums are paid, and then when a loss occurs, and in the final adjustment of the matter the government pays to the insurance carrier the difference between the amount of premiums paid, and the loss, less 10 per cent of the face of the loss, is that it? [103]

A. No, sir, no. The 10 per cent comes in only where you hit your maximum.

Q. Oh. A. We do not have any deductible.

Q. Then, if your maximum is \$100,000.00, then on a \$50,000.00 loss, 10 per cent would not become operative?

A. No, we would pay the insurance carrier in that case \$50,000.00.

Q. You pay him so he is made whole?

A. Yes, sir.

Q. Then in addition to that, you allow him a fixed fee of some kind for carrying the risk?

A. Yes, sir.

Q. Yes, and that is the kind of a policy the United Pacific wrote you? A. Yes, sir.

(Testimony of H. R. Northrup.)

Q. And that is the kind of a policy on which these fees were paid—these premiums were based?

A. Yes.

Q. Yes. On the other hand, with a policy like the Phoenix, if a loss occurred then the matter of the loss is up to the contractor and the insurance carrier to take care of, without any chance of reimbursement from the government?

A. Well, the policy as it stood, did not have the plan so—the 85 cent rate multiplied by the pay roll was just the money that the Phoenix took and held, and if they did not pay a penny, they did not have to return anything to the government.

Q. I just want to get it clear, the difference between the two policies. [104]

A. That is correct. In other words, that is the reason we insist on a comprehensive form. We save money.

Q. Yes, and you insist on the comprehensive plan scheme because you think that is more advantageous to the government?

A. Oh, we know it is, yes, sir.

Q. Yes, and this fixed fee,—I don't want to ask about any specific case, but do you happen to have in mind the fixed fee that was paid to the United Pacific in this matter, the rate?

A. The coverage has not been settled yet. In other words, that will come in at the time of the final settlement.

Q. That is comparable to the fixed fee which the contractor gets for his job, isn't it? It works pretty much on the same basis?

(Testimony of H. R. Northrup.)

A. Oh, I can see differences there. I don't know that I could agree on that. There is a sliding scale, the bigger the job, the less percentage of fee goes to the carrier, and in the United Pacific case, I consolidated all policies, Okes, Lytle, Green, Dowell, and all the others by a connecting endorsement, so in the end we will pay them the lower fee, based on the total, some million and a half dollars probably, of cost, whereas, if we had a lot of separate policies we would have a higher fee on each one, but we worked that out with them and get the benefit.

Q. I understand, so that if a loss for instance occurred under the United Pacific Casualty, which is below the limits, and we will say the limit is \$100,000.00—I don't know what it is, but we will just assume that a [105] loss occurs and the aggregate of the losses are below that amount, and it collects \$50,000.00 of premium, and the losses we will say are seventy-five thousand, then the government would reimburse the twenty-five?

A. Do I understand you to say they collected fifty thousand and the amount of the losses were seventy-five?

Q. Yes, and its limit under the policy was a hundred thousand?

A. Well, the limit under the policy would have no bearing on the premium. In other words, we insist on fifty and one hundred thousand limits, which is the amount of coverage, \$50,000.00 for one person injured or killed in an accident, or \$100,000.00 if

(Testimony of H. R. Northrup.)

any number is killed in the same accident. That has nothing to do with our cost.

Q. It does have to do with reimbursement if the loss is less than the limit, doesn't it?

A. I don't quite follow you there. You have mentioned \$50,000.00 collected by the carrier. Well, now, are you talking about \$50,000.00 representing the premiums shown in the policy? If you take your pay roll, times your rate, you produce \$50,000.00.

Q. How are the premiums paid on this United Pacific, monthly?

A. Monthly, yes, sir.

Q. And if the pay roll is we will say \$100,000.00 a month, what is the premium they get monthly?

A. The hundred thousand dollar pay roll multiplied by the rate shown in the policy, divided in half.

Q. All right, tell us what the amount would be in dollars? [106]

A. Well——

Q. On the rate.

A. \$100,000.00—are you speaking now of public liability or compensation?

Q. No, about public liability.

A. It is four cents a hundred, \$100,000.00——

Q. Well, four cents times a hundred thousand, isn't it?

A. Yes.

Q. And—— A. Divide it in half.

Q. Well, then, that is two cents, is that it?

A. Yes, it is equivalent to two cents.

(Testimony of H. R. Northrup.)

Q. All right, so there isn't much use of talking about four cents, then?      A. Well, yes.

Q. Why?

A. The four cents is the top limit, and they can go up to 90 per cent of that.

Q. Oh, that is the top limit, I see.

A. We guarantee it won't cost more than 90 per cent of——

Q. What is your minimum guarantee?

A. No minimum. If we have no losses, we pay nothing but a little fee.

Q. What is the fee, that is what I want to get at?

A. I can't tell you offhand. Mr. Rowland has copies of the plan. I haven't one with me. The fee in this case will be in the neighborhood. I think, of six per cent of the premium produced by the rate shown in the policy, because we consolidated all this. It runs all the way from 37 per cent on a small case down. [107]

Mr. Peterson: Oh, I think that is all.

### Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, was this the plan you were trying to get Lytle and Green to come under?

Mr. Peterson: We object to that as immaterial, something he was trying to get somebody to do.

The Court: Objection sustained.

Q. Is this fee that goes along with this policy, is that a part of the premium that is produced by the rate times the pay roll, or is that in addition to the rate?



(Testimony of H. R. Northrup.)

A. It is a part of the premium. In other words, we multiply the rate in the policy by the actual payroll and get a premium, and our total responsibility for money payment cannot exceed 90 per cent of that, and excludes the actual money paid to the injured people for death, medical expenses, all expenses of the carrier, fixed fees, claim expense, state taxes if there are any, all added together up to 90 per cent. I make one exception, the state tax will be in addition to the 90 per cent, but we had no state tax on this.

Q. And that is all included in this premium, which in the case of the United Pacific or on this same coverage was four cents per \$100.00?

A. That is right.

Q. And if their losses exceed that 90 per cent of the premium produced, they take the loss?

A. Oh, yes; yes, sir.

Mr. Sager: I think that is all. [108]

Mr. Peterson: That is all.

(Witness excused.)

Mr. Peterson: Your Honor, I notice it is about 4:30. I want to ask the indulgence of the Court. I am in this case on probation, and I want—

The Court: I understand pretty well. We will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock A. M., September 7th, 1944.)

[109]

September 7th, 1944.

10:00 O'clock A. M.

The court met pursuant to adjournment; all parties present.

The Court: Now, you may proceed.

Mr. Sager: At this time, Your Honor, I will offer in evidence certified copy of the contract between the defendant companies and the government.

Mr. Peterson: No objection.

The Court: It will be admitted in evidence.

(Whereupon, certified copy of contract referred to was then received in evidence and marked Defendants' Exhibit A-6.)

#### DEFENDANTS' EXHIBIT A-6

CONTRACT No. WA4pr-14299

Alaska-Canada Highway Project No. 3

Fixed-Fee

Engineering-Management Contract

Public Roads Administration

Project Manager and Address: C. F. Lytle Company, Sioux City, Iowa, and Green Construction Co., Des Moines, Iowa.

Contract For Engineering Management Services In The Construction Of Alaska-Canada Highway Project No. 3.

Location: From a point on the international boundary line between Canada and Alaska to a point near Slana, Alaska, approximately 155 miles, designated Sections A-1 and A-2 as shown on "Plan of

Defendants' Exhibit A-6—(Continued)

Operation'' prepared by Public Roads Administration.

Fixed Fee: Sixty-seven thousand, two hundred dollars (\$67,200.00)

Estimated Construction Cost Exclusive Of Fixed Fee: Eight million, four hundred thousand dollars (\$8,400,000).

Payment: To be made by Regional Disbursing Officer, United States Treasury Department.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following funds, the available balances of which are sufficient to cover the cost of the same.

8002/35902.002 Working Fund, Federal Works Agency, Public Roads Administration (Engineer Services, Army) 1942-43

Fixed-Fee Engineering-Management Contract

This Contract, entered into this fourth day of May, 1942, by the United States of America (hereinafter called "The Government") represented by the Contracting Officer executing this contract, and C. F. Lytle Company, a corporation organized and existing under the laws of the State of Iowa, and of the city of Sioux City, Iowa, and the Green Construction Co., a corporation organized and existing under the laws of the State of Iowa, and of the city of Des Moines, Iowa, acting jointly for the purpose, (hereinafter called the Project Manager).

Witnesseth:

Whereas, the Government has agreed to engage

## Defendants' Exhibit A-6—(Continued)

the Project Manager to perform the services hereinafter set forth, under the general terms and conditions expressed in letter of April 29, 1942, from said Project Manager to the Commissioner of Public Roads and letter of April 30, 1942, from the Commissioner of Public Roads to said Project Manager, which said letters are by reference made a part hereof; and

Whereas, the performance of said services under a fixed-fee contract entered into after negotiations approved by the Commissioner of Public Roads, and without advertising for bids, is authorized under Executive Order No. 9001 as extended by Executive Order No. 9023; and

Whereas, the parties hereto desire that the general terms and conditions set forth in said letters of April 29 and 30, 1942, be expressed in detail and the intention of the parties more clearly defined by entering into a more formal fixed-fee contract for the performance of said services:

Now, Therefore, the parties hereto do mutually agree as follows:

## Article I - Statement of Work

1. The Project Manager shall, in the shortest possible time, furnish engineering-management services to assure the satisfactory completion of the construction of a portion of the Alaska Highway from a point on the international boundary line between Canada and Alaska to a point near Slana, Alaska, a distance of approximately 155 miles, des-

## Defendants' Exhibit A-6—(Continued)

ignated as Sections A-1 and A-2 as shown on the "Plan of Operation" prepared by and on file with the Public Roads Administration.

2. The Project Manager shall, in accordance with the provisions of this contract, provide the following engineering-management services, subject at all times to the direction and approval of the District Engineer of the Public Roads Administration:

(a) Select a representative satisfactory to the Public Roads Administration, such representative being hereinafter designated and referred to as "General Manager," who shall have general direction and supervision of the work.

(b) Recruit the services of an adequate number of competent and experienced contractors with sufficient equipment, machinery, skilled personnel and ability, with the aid of the Project Manager, to obtain necessary labor to perform the work required for the construction of said project. If the contractors thus recruited are satisfactory to the Commissioner of Public Roads, or his duly authorized representative, the Government will enter into a separate contract with each of them for the construction of such portion of the project, the furnishing of such labor, materials, supplies, equipment, and other appropriate services, as may be deemed necessary or desirable to insure completion of the project within the shortest possible time.

(c) Allocate portions of the work to be performed on the project to the individual contractors engaged under subsection (b) hereof, and shift the construction operations of the individual contractors from

## Defendants' Exhibit A-6—(Continued)

place to place as necessary to achieve the most efficient and expeditious prosecution and completion of the work.

(d) Supervise and control the individual contractors with respect to the management of their operations, the work performed by them, the furnishing and handling of their equipment, and the supervision of the employment and discharge of their personnel.

(e) Maintain and operate a central office in the vicinity of the project where all records required by the Government shall be kept, and keep all records required by the Government, including but not limited to fiscal and cost accounts, personnel records, time reports, requisitions, purchase orders and such other records both for the Project Manager and the individual contractors as may be deemed necessary by the Commissioner of Public Roads or his duly authorized representative.

(f) Provide, maintain, and operate a central equipment repair depot, a central storage and supply depot, any requisite sub-depots and camps adequate to provide board and lodging for all personnel engaged to perform any work in connection with the project, and adequate sanitary, health and hospital facilities not otherwise provided in connection therewith.

(g) Provide adequate facilities for communication between all parts of the work and with representatives of the District Engineer, assigned to supervise and direct the work, and for transporta-

## Defendants' Exhibit A-6—(Continued)

tion of supplies and equipment between the various parts of the work.

(h) Furnish for the consideration and approval of the District Engineer a chart showing the executive, administrative and other personnel, exclusive of labor, to be employed in furnishing management services for the project, indicating their duties and proposed salaries, and designating the individuals and salaries or portions thereof considered as part of the general overhead expenses. This chart shall be supplemented from time to time during the progress of the work so that it shall present, for the consideration and approval of the District Engineer, such revisions as are deemed necessary by the Project Manager.

(i) Furnish such other management services in connection with the work as may be required by the Commissioner of Public Roads or his duly authorized representative.

(3). It is estimated that the construction cost of the work covered by this contract will be eight million, four hundred thousand dollars (\$8,400,000.00) exclusive of all fixed fees, and that the work herein contracted for will be ready for utilization by the Government on or before December 31, 1942. It is expressly understood, however, that neither the Government nor the Project Manager guarantees the correctness of either of these estimates. The estimated cost set forth above is based upon the best data now available to both the Government and the Project Manager.

## Defendants' Exhibit A-6—(Continued)

In consideration for his undertaking this contract, the Project Manager shall receive the following:

(a) Reimbursement for expenditures as provided in Article II.

(b) A fixed fee in the amount of sixty-seven thousand, two hundred dollars (\$67,200.00), which shall constitute complete compensation for the Project Manager's services, including profit and all general overhead expenses.

4. The Contracting Officer or his authorized representative may at any time, by written order and without notice to sureties, if any, make changes in or additions to the plans and specifications, issue additional instructions, require additional work on Sections A-1 and A-2, and order work on other sections of the highway in Alaska not mentioned above, or direct the omission of work covered by the contract. It is understood that the fixed fee is based on the estimated cost of the work specified in paragraph 1, Article I, of this contract. It therefore is agreed that any work not completed on Sections A-1 and A-2 by the end of the 1942 construction season because of any such additions or changes in plans and specifications or any requirement of work not contemplated by the plans for Sections A-1 and A-2 shall not prejudice the right of the Project Manager to the fixed fee under this contract and such unfinished work shall be covered by a new fixed fee to be agreed upon between the parties here-



## Defendants' Exhibit A-6—(Continued)

to. If in the judgment of the Contracting Officer there is a substantial increase in the work estimated under this contract, an adjustment in the fixed fee may be made if it is determined by the Contracting Officer that an adjustment will be justified and will be within the authority of law. In no event shall such fixed fee exceed the limitation prescribed by law.

5. Title to all materials, tools, machinery, equipment and supplies the cost or value of which is to be reimbursed the Project Manager by the Government shall vest in the Government at such point or points as the District Engineer may designate in writing; Provided, That the right of final inspection and acceptance or rejection of such materials, tools, machinery, equipment and supplies at such place or places as he may designate in writing is reserved to the District Engineer; Provided further, That upon such final inspection the Project Manager shall be given written notice of acceptance or rejection as the case may be. In the event of rejection, the Project Manager shall be responsible for the removal of the rejected property within a reasonable time.

6. During the performance of this contract, the work shall be under the full-time resident direction of a General Manager selected by the Project Manager and approved by the Contracting Officer. In no event shall the Project Manager be entitled to reimbursement for any salary, wages, or like compensation for the direction of the work, whether

Defendants' Exhibit A-6—(Continued)  
performed by an individual, a partner, a corporate officer or other representative, except as shown on the approved chart submitted in compliance with paragraph 2 (h) of Article I hereof.

## Article II - Cost of the Work

1. Reimbursement for Project Manager's Expenditures. The Project Manager shall be reimbursed in the manner hereinafter described for such of his actual expenditures in the performance of the work as may be approved or ratified by the Contracting Officer or the District Engineer and as are included in the following items:

(a) All labor, material, tools, machinery, equipment, supplies, services, power, and fuel necessary for either temporary or permanent use in the performance of the services required hereunder.

(b) All subcontracts made in accordance with the provisions of this contract. Provided, however, that regardless of the form of any subcontract, the fees or profits of any such subcontractor shall not be considered as a cost for which the Project Manager will be entitled to reimbursement.

(c) Such equipment rentals, and such repairs and repair parts as are not included in the rental of equipment from construction contractors and not made necessary by the fault or negligence of the Project Manager or his employees, reimbursement to be in accordance with the terms of the Equipment Rental Schedule of Public Roads Administration approved May, 1942.

Defendants' Exhibit A-6—(Continued)

(d) Transportation charges on materials and supplies.

(e) Transportation and traveling expenses to and from the work of the necessary field forces for the economical and successful prosecution of the work; expenses of procuring labor and expediting the production and transportation of materials and equipment. Expenditures under these items must have the written authorization of the District Engineer in advance.

(f) Salaries of superintendents, timekeepers, foremen, and other field employees of the Project Manager in connection with the work. In case the full time of any field employee of the Project Manager is not applied to the work, his salary shall be included in this item only in proportion to the actual time applied thereto. No person, other than a laborer or mechanic, shall be assigned to service by the Project Manager until there has been submitted to and approved by the District Engineer, a statement of the qualifications, experience and salary of the person proposed for such assignment. No compensation of such employees shall be reimbursed by the Government except in accordance with the salary schedules approved by the District Engineer for this work.

(h) Premiums on such bonds and insurance policies as the District Engineer may approve or require as reasonably necessary for the protection of the Government or the Project Manager.

(j) Payments from his own funds made by the

## Defendants' Exhibit A-6—(Continued)

Project Manager under the Social Security Act, and any disbursements required by law, which the Project Manager may be required on account of this contract to pay on or for any plant, equipment, process, organization, materials, supplies, or personnel.

(k) If the General Manager and/or his representative shall be required to travel, the Government will reimburse the Project Manager for the transportation, including Pullman where necessary, and will allow for such travel six dollars (\$6.00) per day in lieu of all other expenses. Transportation by privately owned automobile on such required travel shall be reimbursed at the rate of five cents (\$.05) per mile per vehicle as representing the actual cost of such transportation. All such travel shall either be authorized or approved in writing by the District Engineer.

(1) Disbursements incident to the payment of pay rolls either of the Project Manager or the individual contractors, including but not limited to, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments to employees are made by check, facilities for cashing checks must be provided without expense to employees and the Project Manager shall be reimbursed therefor.

3. Government's Right to Make Direct Payments. (a) The Government reserves the right to pay directly to common carriers any or all freight charges on materials, equipment and supplies.

(c) The Government reserves the right to pay

Defendants' Exhibit A-6—(Continued)

directly to the persons concerned all sums due from the Project Manager for labor, materials, or other charges.

Article III - Payments

1. Reimbursement for Cost. The Government will currently, at the option of the Project Manager, reimburse the Project Manager for or pay directly to the persons concerned all direct costs incurred in accordance with Article II upon certification to and verification by the Contracting Officer of the receipted invoices and such other documents as the Contracting Officer may require. Generally, reimbursement will be made weekly, semi-monthly, or monthly as requested by the Project Manager.

2. Payment of the Fixed Fee. The fixed fee prescribed in Article I shall be compensation in full for the services of the Project Manager, including profit and all general overhead expenses. Eighty percent (80%) of the said fixed fee shall be paid as it accrues in monthly installments, based on the percentage of the completion of the work as determined from estimates made and approved by the District Engineer. Upon completion of the work and its final acceptance, any unpaid balance of the fee shall be paid to the Project Manager.

3. Payments by Project Manager. If bills for purchases or services of any kind incurred by the Project Manager hereunder and properly chargeable to the project are not paid promptly by the Project Manager, the Contracting Officer may, in his discretion, withhold from payments otherwise

## Defendants' Exhibit A-6—(Continued)

due the Project Manager an amount equivalent to the amount of any such bill. Should the Project Manager neglect or refuse to pay such bills within five (5) days after notice from the Contracting Officer so to do, the Government shall have the right to pay such bills directly, and in such event a deduction equal to five percent (5%) of the amount so paid directly shall be made from the Project Manager's fee.

4. Final Payment. Upon completion of the work and its final acceptance in writing by the Contracting Officer, the Government shall pay to the Project Manager the unpaid balance of the cost of the work determined under Article II hereof, and of the fee, less any sum that may be necessary to settle any unsettled claims in connection with this contract, or any claim the Government may have against the Project Manager. The Contracting Officer shall accept the completed work with reasonable promptness. Prior to final payment and as a condition thereto, the Project Manager shall furnish the Government with a release of all claims against the Government arising under and by virtue of this contract other than such claims, if any, as are specifically excepted by the Project Manager from the operation of the release in stated amounts to be set forth therein.

## Article IV - Records and Accounts—

## Inspection and Audit

3. Any duly authorized representative of the Pro-

## Defendants' Exhibit A-6—(Continued)

ject Manager shall be accorded the privilege of examining the books, records, and papers of the District Engineer relating to the cost of the work for the purpose of checking and verifying such cost.

## Article V - Special Requirements

1. The Project Manager hereby agrees that he will:

(a) Procure and thereafter maintain such bonds and insurance in such forms and in such amounts and for such periods of time as the Contracting Officer or his authorized representative may approve or require. In every instance where this contract requires the United States to reimburse the Project Manager the premium on a bond or insurance policy, the bond or insurance policy shall contain an indorsement or other recital excluding by appropriate language any claim on the part of the insurer or obligor to be subrogated, on payment of a loss or otherwise, to any claim against the United States.

(c) Enter into no subcontract for any portion of such work, except in the form prescribed by the Commissioner of Public Roads, nor without the written approval of the District Engineer. Subcontracts are defined as contracts entered into by the Project Manager with others which involve the performance, wholly or in part at the site of the work, of some part of the work described in Article I hereof.

(d) At all times during the progress of the work, keep at the site thereof a duly appointed and qualified representative who shall receive and execute

Defendants' Exhibit A-6—(Continued)  
on the part of the Project Manager such notices, directions, and instructions as the District Engineer may give.

(h) The Project Manager further agrees that upon the termination of this contract, or upon the termination of the services of any of his employees recruited in and brought from the United States, he will return such employees in accordance with the terms of their contract of hire immediately to the place of their recruitment or, at the option of the employees, to some other place in the United States at equivalent or less cost. The expense of returning employees to the United States hereunder shall be a reimbursable charge under the contract.

#### Article IX - Labor

(c) Should the Project Manager or any subcontractor pay to any laborer or mechanic a wage based upon a rate in excess of the wage rate for the classification in which said laborer or mechanic is included, as approved for the work by the Contracting Officer or his authorized representative, such increased wage shall be at the expense of the Project Manager and shall not be reimbursed by the United States. When, in connection with the audit and check by the District Engineer, or his authorized representative, of the Project Manager pay rolls, it is found that one or more laborers or mechanics have been paid wages at rates in excess of the approved wage rates established for such laborers or mechanics, the reimbursement made to the Project



## Defendants' Exhibit A-6—(Continued)

Manager on account of such pay rolls will not include such excess payments.

## Article X - Workmen's Compensation Insurance

During the life of this contract the Project Manager will provide and maintain, for all employees of the Project Manager engaged in work under this contract, Workmen's Compensation Insurance or such other protection for employees as may be required by Federal, State, Canadian or Provincial statutes in the jurisdiction in which such work is performed, or such protection for employees as may be required by the Contracting Officer in those places where there are no such statutory requirements, under direction of the Contracting Officer. If the whole or any part of the work under this contract is sublet, the same protection provided for employees of the Project Manager will be provided for the protection of the employees of the subcontractors. The Project Manager shall supply the District Engineer with proof of compliance with this Article.

## Article XI - Accident Prevention

In order to protect the life and health of his employees in the performance of this contract, the Project Manager will take or cause to be taken such measures as the Contracting Officer may determine to be reasonably necessary for this purpose.

Article XII - Notice To Government of  
Labor Disputes

Whenever an actual or potential labor dispute is

## Defendants' Exhibit A-6—(Continued)

delaying or threatens to delay the timely performance of the work, the Project Manager will immediately give notice thereof to the District Engineer. Such notice shall include all relevant information with respect to such dispute.

## Article XVI - Definitions

5. The term "General Manager" shall mean the representative of the Project Manager having general direction and supervision of the work.

## EQUIPMENT RENT SCHEDULE

(4) Each piece of equipment furnished by the contractor on which rental rates will be paid must be certified and approved by the Engineer in charge as necessary and as of suitable type and capacity for use on the project and must be given an identifying number as directed by the Engineer. Such certification and approval by the Engineer will be made prior to placing the equipment in operation, and neither the rental nor the shipping charges will be paid for equipment not certified and approved.

(5) If requested, preliminary inspection and certification of equipment prior to shipment will be made by the Public Roads Administration. This preliminary inspection and certification is for the purpose of expediting the loading and shipping of equipment determined to be necessary and does not constitute evidence of approval of condition of equipment at the job site.

(6) The responsibility for the condition of the

## Defendants' Exhibit A-6—(Continued)

equipment is placed solely on the contractor and approval of class, type and capacity of equipment by the Engineer it not to be construed as approval of the condition of the equipment. If at any time any unit of equipment furnished by the contractor cannot be operated efficiently due to its having been originally furnished in an unsatisfactory condition or with defective, missing, or badly worn parts, the Engineer shall notify the contractor of the suspension of the rental until such time as the equipment has been placed in a satisfactory condition. The cost of placing such equipment in satisfactory operating condition shall be borne by the contractor and shall not be reimburseable as a part of the project cost. The judgment of the Engineer as to the condition of equipment shall be final.

(14) Necessary repair and operating costs of the equipment will be paid directly by the contractor and be reimbursable as a part of the direct project cost.

(17) Charge for necessary packing and loading for shipment to the project, necessary unpacking and unloading charges at destination, and necessary packing and loading charges for return shipment will be subject to reimbursement. Unpacking and unloading charges at destination upon return of equipment will not be subject to reimbursement.

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Mr. Sager: I would like to recall Mr. Northrup for further examination.

Mr. Peterson: I wonder if you will at the same time, put in a unit contract so the whole matter will be before the Court.

Mr. Sager: I will be glad to do that, but I haven't a certified copy.

Mr. Peterson: Is yours easy to read?

Mr. Sager: This is the one I gave you before, the copy.

Mr. Peterson: If you don't mind, I have a face copy. It is easier for the Court to read.

Mr. Conley: I would like to call counsel's attention to the fact it is marked up.

Mr. Sager: And may it be stipulated, Mr. [110] Peterson, that this is a contract—that Defendants' Exhibit A-7 being a contract—copy of the contract between the government and Frank Eblen and Orville Eblen.

Mr. Peterson: No objection.

Mr. Sager: One of the unit contractors on this job, and that all of the other unit contractors were the same.

Mr. Peterson: Same form, except probably as to amounts and names of parties.

Mr. Sager: Yes, we offer it then with that—

The Court: It will be admitted in evidence.

(Whereupon, unit contract referred to was received in evidence and marked Defendants' Exhibit A-7.)

Mr. Sager: I would like to recall Mr. Northrup for one or two further questions, if the Court please.

H. R. NORTHRUP,

resumed the stand as a witness on behalf of the Defendants, was examined and testified further as follows:

Redirect Examination

By Mr. Sager:

Q. Mr. Northrup, was there any employees' compensation insurance on this Lytle and Green project?

A. None, in a private insurance carrier.

Q. Well, that is what I mean.

Mr. Sager: That is all. [111]

Mr. Peterson: I would like to ask one further question, if I may.

Recross Examination

By Mr. Peterson:

Q. Directing your attention, Mr. Northrup, to the policies issued by the United Pacific Casualty Insurance Company, are you able to tell us whether or not the United States was a named assured in that policy?

A. No, sir, they were not.

Q. It was not? A. No, sir.

Mr. Peterson: That is all.

Mr. Sager: That is all.

Mr. Peterson: Just a minute. Later on I understand that—oh, never mind.

Mr. Sager: I guess that is all.

(Witness excused.) [112]

## M. B. CHRISTENSEN,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

## Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. M. B. Christensen.

Q. And your present occupation, Mr. Christensen?

A. Highway engineer, United States Public Roads Administration.

Q. How long have you been with the Public Roads Administration?

A. Approximately eighteen years.

Q. And did you have anything to do with the Lytle and Green contract?

A. In what way do you mean?

Q. Well, with the appearing on it?

A. I had nothing to do with the contract directly. However, I was connected with the Alaska Highway in a personal capacity.

Q. And where?      A. At Seattle.

Q. During what period of time?

A. During 1942, from May until about February of '43.

Q. And what were your duties in that position during that time?

A. I was in charge of the personnel division for the Alaska Highway, having to do with the government employees, primarily. [113]

(Testimony of M. B. Christensen.)

Q. And what project or job was under your supervision, or your work?

A. Well, I had the recruiting, hiring, and everything pertaining to it,—all of the engineering, administrative, and other employees of the government, including the workmen under the Lytle and Green contract and associated contractors.

Q. Do you know Mr. Wally?

A. Yes, he is an employee of the Washington office of the Public Roads Administration. I am not sure of his exact title, some kind of an administrative assistant, something of that sort.

Q. Now, did you have anything to do while you were in Seattle, in 1942, with the men working on the Alaska job under the Lytle and Green management contract?

A. Very little with the men, personally. However, I handled all their appointment papers.

Q. And how did you receive them?

A. They were sent to our office by Mr. Wally, who had been recruiting them or arranging for their appointments back in Iowa.

Mr. Peterson: Now, we object to his testimony as to what Mr. Wally was doing. Obviously, it is hearsay.

The Court: The answer will stand, objection overruled.

Q. What papers did you receive with respect to these men from Mr. Wally?

A. There were a number of papers—I believe you have a set of them there. They are the same

(Testimony of M. B. Christensen.)

forms as are used in the case of hiring any other federal employee. There is [114] the fingerprint chart, the medical certificate and application form, and an office——

Mr. Peterson: I think the record when it is finally introduced, if introduced, will speak for itself.

Q. Showing you Defendants' Exhibit A-8, of what does that exhibit consist, Mr. Christensen?

A. This consists of the papers which were received by me in connection with the appointment of the employees, except for this last—this last card is merely a card index we use in our file. It was made up for our ready reference, there. It was not prepared as part of the appointment directly, and this manifold folder here, a number of copies, was not received by me from Mr. Wally, it is the form that we prepared in Seattle for the official appointment.

Q. Now, perhaps those forms have some number or designation. Would you refer to them by that, and state what each one is?

Mr. Peterson: I think it shows on its face. I submit, if the Court pleases, that these documents are printed, and they must show on the face what they are. It is unnecessary.

Mr. Sager: I am not too sure they do that, without some explanation.

Mr. Peterson: Well, if any explanation is necessary, the time for that has not been reached.

The Court: Oh, he may answer. It is purely



(Testimony of M. B. Christensen.)

a matter of identification of the exhibit. The exhibit has not been offered yet. [115]

A. The first form is merely an identification card that the employee kept with him on the project.

The next one is the fingerprint chart. The next one is the recommendation for appointment, which gave the employee's name and title, salary and so on, and signed by Mr. Wally.

The next one is an application form prepared by the employee.

The next one is a *personnel* history statement prepared by the employee himself to show the various things with reference to his previous life, and then there is a *personnel* affidavit in which he says he is not a member of any subversive organization.

There is the oath of office, which entirely speaks for itself, a certificate of medical examination, and then this is the one I mentioned which is prepared in our office, the official appointment.

Q. Yes. Now, are those the usual forms required for Civil Service appointees?

A. They are the same forms as were used for the employment of all of our engineers, accountants, and other Civil Service employees, which were recruited for this job.

Q. And are they used for other jobs for Civil Service appointees?

A. Yes, sir, they are used for all Civil Service appointments, except this identification card is not ordinarily used in the States.

(Testimony of M. B. Christensen.)

Q. That is the top one?

A. The top one, yes.

Q. Now, then all of those forms except the last two, do I [116] understand to be received by you from Mr. Wally? A. That is right.

Q. With respect to each person on the job?

A. With respect to each one of those Lytle and Green workmen.

Q. And then what did you do upon receipt of that series of forms?

A. We checked through them to see that everything was properly filled in, and papers were complete in all respects, properly signed, and then we prepared this last form here, the official notification of appointment, which copies were distributed to the employee himself and to the accounting offices, to the Washington office of the Civil Service Commission and various other places.

Q. The forms that came to you from Iowa, by whom were they signed?

Mr. Peterson: I think the forms are the best evidence.

Mr. Sager: Let me straighten this out.

Q. This is just a set of blanks that you have now as an exhibit?

A. These are blank forms, yes, sir, no signatures on them. The medical certificate of course is signed by the doctors.

Mr. Peterson: Just a minute, I think the——

The Witness: Pardon, I did not hear.

Mr. Sager: There is an objection.

(Testimony of M. B. Christensen.)

Mr. Peterson: Whatever they are, the signed documents, are the best evidence of who they were signed by and when they were signed.

Mr. Sager: These are not signed by anybody, [117] of course. This is just a blank set of forms.

The Court: He may answer.

Mr. Peterson: Take exception to the ruling of the Court.

A. Most of these forms were filled out by the employee himself and signed by him.

Mr. Peterson: Now, the form, the original is the best evidence, and as I understand the rule, in the absence of a showing it is lost or can't be produced, is the only evidence. I am objecting to all this evidence.

The Court: That is true, Mr. Peterson, as a rule, but in this particular case the Court is not going to require the hundreds of employees who were employed here, that their records be brought in in order to meet a situation as presented at this time in this case. These employees were either employees who were sought to be selected as Civil Service employees, or in fact Civil Service employees, and it would be all out of reason to attempt to bring in the entire pay roll of every individual who is named in these documents, who have heretofore been admitted on these submitted pay rolls.

Mr. Peterson: May I interrogate the witness a minute in respect to this?

The Court: Yes, you may.

Mr. Peterson: Where are those originals that were sent to you?

(Testimony of M. B. Christensen.)

A. I am not sure whether they are still in Chicago or whether they have been taken to Washington, D. C.

Mr. Peterson: Did you make any request to [118] obtain—were you asked to obtain them if they were obtainable?

A. I did not. I don't know whether Mr. Sager did.

Mr. Peterson: Well, no request was made of you?

A. No, sir, I have had no control over them since last October.

Mr. Peterson: They came out here, and after you had gotten through with your connection with the matter, you sent them in to some place?

A. Yes, sir.

Mr. Peterson: Oh, I think that we could not agree with the Court's ruling, because there are many of them that this fact that there are many, I do not understand changes the rules of evidence. However, in order to shorten the matter up as I promised last night, we will stipulate that these various workmen made applications and with respect to each workmen a form, as you have marked that as an exhibit, was filled out.

Mr. Sager: We will offer that in evidence then. What is the exhibit number?

The Clerk: A-8.

The Court: It will be admitted in evidence.

(Whereupon, set of forms referred to were

(Testimony of M. B. Christensen.)

then received in evidence and marked Defendant's A-8.)

Mr. Peterson: And of course, it is subject to our general objection.

The Court: Yes, I understand your general [119] objection is, it is immaterial whether they were or were not employed in this manner?

Mr. Peterson: Yes.

Q. Were any of these forms that came to you signed by the contractors?

A. No, sir, they were not.

Q. Mr. Christensen, are you familiar with the circumstances of these men's Civil Service status, while on this work?

A. Yes, if I understand your question correctly.

Q. Well, let me ask you this: Do you know whether or not Social Security was deducted from their pay?

A. No, sir, it was not.

Q. Let me ask you this, are there different classifications under Civil Service?

A. Yes, sir.

Mr. Peterson: I think the Civil Service Act, and the rules and regulations are the best evidence as to that.

Q. What general classification were these employees under?

A. They were under what we call Schedule "A" Employees, hired under Schedule "A" of the Civil Service regulations, which largely pertains to employment of people for duty outside of the United States, as distinguished from the ordinary em-

(Testimony of M. B. Christensen.)

ployees working in the United States. The primary difference there, is they are not required to take competitive examinations, and to be certified by the Civil Service Commission from a list of eligibles, but merely the employing officer satisfies himself as to the qualifications. He can hire any one he pleases, foreign or otherwise, providing he is not an enemy alien. [120]

Q. Were these men paid for overtime?

Mr. Peterson: I think that is immaterial, if the Court pleases.

The Court: I do not know the materiality.

Mr. Sager: I will suggest to the Court the materiality. If they are on Civil Service, they do not get overtime. If they are individual employees under the laws they get paid overtime for anything in excess of eight hours a day, or for Sundays.

The Court: He may answer.

A. Originally, they were not paid anything other than straight time for the time worked. Those were hourly employees on an hourly basis. I think a few of them were on a monthly basis—administrative employees. They have received on overtime, but by special act of Congress or an executive order—I have forgotten which, late in 1942, they changed it so they could receive overtime for work in excess of eight hours a day.

Q. And was that applicable to all government employees?

A. It was to those employed in Alaska only.

(Testimony of M. B. Christensen.)

It did not apply to those in the United States or in Canada.

Q. Did these men acquire annual leave or sick leave?

A. Those who were employed on a monthly basis did, but those who were on an hourly basis did not, on the ground they were intermittent employees.

Mr. Peterson: May I just object to his stating the grounds? He can state the facts.

The Court: Yes.

Q. Is that provision true of the Schedule "A" Civil Service employees generally? [121]

A. The same is true on all of them, as I understand.

Q. Do you know, Mr. Christensen, whether these men—whether any men were injured on this job during the period of the coverage of this contract, June 17th to August 31st, 1942?

A. Yes, sir, there were a number of them.

Q. Do you know whether or not they were certified to the Federal Employees' Compensation Commission?

A. Yes, sir, they were.

Mr. Peterson: We submit, of course, that is immaterial. This is a policy, and did not cover compensation. It simply covered liability.

Mr. Sager: There isn't any argument about that, but this is a factor to determine whether or not they are government employees.

The Court: He has answered. You will proceed.

Mr. Sager: I have a certified copy, if Your

(Testimony of M. B. Christensen.)

Honor please, of a series of records of the Employees' Compensation Commission of employees under these—one or more of these contracts that were injured during this period of time. I will offer that in evidence and think the certificate will not by itself show that the men were under these contracts, but I will, if it is admitted, I will have Mr. Christensen identify the names.

The Court: You mean, the facts would show that they were employees who, had they been other than as you contend, employees of the insured here, the insurer would have been liable?

Mr. Sager: I don't mean that.

The Court: Growing out of the negligence? [122]

Mr. Sager: The purpose of this is to show that only if they were compensated by the Employees' Compensation Commission they must be government employees. That is the only type of employee they pay. If they are not government employees they are paid then under a compensation insurance policy, under the law which requires it the same up there as in the States, all employees, and that is true under the Federal Acts; employers must carry compensatiton insurance for their employees, accident insurance for their employees. If they are government employees, then they do not have to carry that, and they are compensated through the Federal Compensation Act, by the Commission.

Mr. Peterson: We object to this on the ground, of course, if the Court pleases, that it is voluminous and it simply will encumber the record here, if this



(Testimony of M. B. Christensen.)

case goes on appeal, this will all have to be printed.

Now, we are not going to dispute the fact that injured employees were compensated through the Compensation Commission. That is the only fact I understand he is interested in showing. It doesn't seem to me it is necessary to go ahead and show each individual and introduce all these reports and blanks.

The Court: I do not think it is necessary to introduce the exhibit if you stipulate that any employee upon the work here involved, if he suffered an injury whether by the negligence of a fellow employee or otherwise in the course of his employment, was cared for under the Federal Employees' Liability Act, or Compensation Act. [123]

Mr. Peterson: I don't know the facts, Your Honor. I have no knowledge of the facts. We are not going to offer any evidence on it. I do not like to stipulate to anything I don't know anything about, just as a matter of policy, but we are not going to offer any evidence on it. If we are willing to accept their proof on that, as far as that is concerned, these employees who were injured were compensated through the Federal Employees' Compensation Act, or whatever Act it was.

Mr. Sager: Well, of course I think the stipulation should go further than that. I am not too familiar with the Federal Employees' Compensation Act, but I think it also takes care of a situation where he may be a private employee and under the Act, the employer is required to provide compensa-

(Testimony of M. B. Christensen.)

tion insurance. To merely say they were covered under the Act, would not cover our situation here.

If you will stipulate these men were paid and compensated by the Federal Employees' Compensation Commission, with a government check, that is paid by the Commission, then I am not too interested in putting it in the record, although that is the proof of the ultimate fact, and that is the only thing I know about it is what the record shows.

Mr. Peterson: Well, there is a certificate on here of thirty-eight sheets. They are all small type-writing:

"I hereby certify that the injured persons named in the annexed papers were considered employees of [124] the Public Roads Administration of the Federal Works Agency, and were paid disability compensation and/or furnished medical treatment at the expense of the United States Employees' Compensation Commission under the United States Employees' Compensation Act of September 7, 1916 (39 Statute 742), and were paid disability compensation and/or furnished medical treatment as employees of the United States Government.

"I further certify that this Commission is not authorized by law to have and has not a seal."

Now, that seems to be the extent to which this compensation went.

The Court: Well, that certificate is evidently for the purpose of attempting to make the document admissible.

(Testimony of M. B. Christensen.)

Mr. Peterson: I think it has another purpose as well. It defines how they were compensated and under what provisions of the statute.

The Court: The Court takes judicial notice of the fact that the law provides the regulations of compensation can only be paid to a certain class, and certain groups, and they have to have a certain status. That is, every employee working upon a——

Mr. Peterson: After reading this certificate, Your Honor, we are willing to stipulate that employees who suffered injuries during the course of the work, employees of any—I don't know that there were any—between June 17th and September 1st, but if any did, they received compensation under the United States Employees' Compensation Act of September 7th, 1916, as [125] stated in the certificate.

The Court: And such medical care and attention?

Mr. Peterson: Yes, and such medical care and attention, were paid disability compensation, and/or furnished medical treatment as employees of the United States.

Mr. Sager: And that they were paid by the Federal Employees' Compensation Commission by government check.

Mr. Peterson: Well, I presume so. They must have been paid by the government in some manner. I think it is unimportant, as long as they were paid.

(Testimony of M. B. Christensen.)

Mr. Sager: I think it may be important whether they were paid by the Commission or paid by a private insurer.

Mr. Peterson: They were not paid by private insurers. We agreed to that. They were paid by the government, but that stipulation of it, we will admit those facts subject to our objection that they are irrelevant and immaterial in this case.

The Court: I do not see, Mr. Sager, under that stipulation that it has become necessary to submit as a part of the record in this case, the documents that are now in question.

Mr. Sager: I think probably that is right, Your Honor, and I do not want to insist on it. I would like to reserve the right, further though, I would like to examine it. There may be some part of it in addition to the stipulation that may be important. If I may [126] reserve the right, I do not want to withdraw the offer.

The Court: Very well.

Q. Mr. Christensen, do appointees under Schedule "A" of the Civil Service, are they entitled to a hearing upon discharge of termination of employment?

A. No, sir, they are not in the same manner as the regular Civil Service employee, who can only be discharged on showing of cause, except in case of reduction of force. These particular employees under Schedule "A" could be discharged any time we saw fit without showing the particular cause.

(Testimony of M. B. Christensen.)

Q. Do you know when the Civil Service status of these employees was terminated under the Lytle and Green project?

A. On March 30th, 1943, except for a few that had some annual leave earned, and they were carried for a few days beyond that to take care of their leave. March 31st, I should have said, instead of March 30th.

Q. Do you know whether or not at that time there was any agreement entered into by these men and the contractors?

A. Yes, sir, they were then signed up under the contractors' hiring agreement.

Q. Each——

A. Each individual employee.

Mr. Peterson: We submit the contract, whatever it is, is the best evidence. That evidence is a single contract signed by all these men, and we move to strike the answer and object to the evidence on the ground that the contract itself is the best evidence.

The Court: Objection will be overruled and exception allowed. [127]

Mr. Peterson: Note an exception.

Mr. Sager: You may inquire.

#### Cross Examination

By Mr. Peterson:

Q. Now, where were you—when did you come to Seattle, Mr. Christensen?

A. I believe it was the 18th of May, within a day or so of that.

(Testimony of M. B. Christensen.)

Q. The 18th of May, 1942?

A. '42, yes, sir.

Q. Where were you prior to that time?

A. I was in Ogden, Utah, my regular headquarters.

Q. How long had you been continuously in Ogden, Utah?

A. I had been there for approximately twelve years?

Q. Twelve years?

A. Prior to going to Seattle.

Q. You were not in Sioux City, Iowa, during the spring of 1942? A. No, sir.

Q. No, or in Nebraska? A. No, sir.

Q. So, you did not have anything to do with the hiring and recruiting of these men?

A. No, sir.

Q. And you don't know who hired and recruited them, as matter of fact?

A. Except that the papers of recommendation for appointment were signed by Mr. Wally.

Q. That is all you know about it? [128]

A. Yes, sir.

Q. You don't know who approached the individual and agreed on his wages, or what was done about that? A. No, sir.

Q. You have been connected with the Public Roads Administration right along?

A. Yes, sir.

Q. Yes. I show you Exhibit No. 10, and you will notice in the column under "Deductions" there

(Testimony of M. B. Christensen.)

are a number of deductions there. Are you able to tell anything about those?

A. They are deductions for board and lodging.

Q. They are deductions, sure of that?

A. I am quite positive.

Q. As a matter of fact, you don't know what they are for?

Mr. Sager: I submit that is argumentative.

The Court: Yes.

Q. As a matter of fact, you don't know what they were for, do you?

A. I was told by the one that prepared them. I did not prepare it myself.

Mr. Preston: I am asking him to testify to his own knowledge. I don't want him to testify to what some bellhop in the hotel told him.

A. I did not prepare the pay roll, so I can't say.

Q. You do not know.

Mr. Peterson: That is all.

The Court: I wanted to ask you a question or two. When these employees—well, first I will ask you just what was your relationship to this particular part [129] of the construction of the Alaska Highway?

A. I was in charge of the personnel division of the entire Alaska Highway District, and had to do with anything pertaining to the appointments and promotions and discharges, employees' compensation and things of that kind, with respect to government employees. Nothing particularly to do with those who were not government employees.

(Testimony of M. B. Christensen.)

The Court: Well, under the plan or arrangement that was in effect in 1942 at the time this hearing is involved, aside from the office staff and such similar employees, the other employees were what you designated as Civil Service employees?

A. I don't quite understand.

The Court: The man who used a pick and shovel and who drove the bulldozer and the tractor and the fellow who did all of the work on this job——

A. Yes, sir, they were Civil Service employees.

The Court: Well, were you in charge of them, was that——

A. Only so far as the personnel paper work was concerned. I didn't have anything to do with them while on the job.

The Court: Suppose one was to be discharged?

A. Then the recommendation was sent in from Alaska to that effect, and then we prepared the official——

The Court: Well, was that recommendation from some other government employee in the Bureau of Public Roads, or Public Administration, as it is now called? [130]

A. Yes, sir.

The Court: And who fixed their compensation?

A. That is something I cannot answer. The papers came to me. This is the recommended salary or wage, and we did not go beyond that question to fix it.

The Court: Well, those papers came to you from another employee?



(Testimony of M. B. Christensen.)

A. Signed by Mr. Wally, recommending the appointment.

The Court: Who had to do with their promotions or wage increases?

A. The papers on that came to me, signed by Mr. Polk, who was the man in charge of the Lytle and Green work in Alaska. That is, the engineer for the government in charge of all of the work in Alaska, on the Alaska Highway.

The Court: Then, did you keep the record as submitted to you from the job itself, as to who was entitled to sick leave and vacation pay and so forth?

A. That was kept not by the personnel division, but by our accounting division.

The Court: Did you have anything to do either directly or indirectly with the submitted pay rolls, monthly, that have been introduced in evidence here as exhibits in the case?

A. No, sir, except to refer to them occasionally.

The Court: I think that is all. [131]

By Mr. Peterson (Continuing):

Q. Now, I understand that your job was receiving these papers that were blanks—were made up and signed back in Sioux City, Iowa, and where they recruited these men? A. Yes.

Q. And then when some fellow up at the job was fired, a pick-and-shovel man, there was some kind of a report made out by the district engineer up there and the employer, and that was sent down to you? A. Yes, sir.

(Testimony of M. B. Christensen.)

Q. And that was about the extent of your connection with this matter, wasn't it?

A. Except that these papers that were received, were only recommendations. They were not official appointments or official discharges. We prepared those official papers of appointments and discharges, prepared them in our office.

Q. When they fired a pick-and-shovel fellow up there, and you got a report down here, did you do anything to get him put back on the job or anything of that kind?      A. No, sir.

Q. You prepared some memorandum, what you called an official discharge, then, based on what you received from Alaska?      A. That is right.

The Court: Well, did you have any discretion in the matter as to whether you would accept or reject?

A. Well, we probably could have had. However, we were willing to accept the recommendations that came in from Mr. Polk, our engineer in Alaska. I did not [132] question his actions as being correct.

Q. You want to tell the Court you could have directed the people in Alaska to put the fellow on the job again?      A. I think we could have.

Q. Did you in any case?      A. No, sir.

The Court: And did you have any discretion in whether to certify an individual whose name had been sent to you and who had made an application for appointment?

A. The question never arose, because we were

(Testimony of M. B. Christensen.)

just willing to accept what were sent to us. We probably could have, but we just did not.

The Court: Well, then, let me ask you the question in another way. If it had not been sent to you at all, would this fellow be eligible to employment?

A. We employed hundreds of engineering and administrative employees for our own direct operations without having the recommendations coming from anybody else. We just prepared them ourselves, applications we received.

The Court: Now, what I am trying to get clear is, was this just a formality, this matter of sending an employee of the Public Roads Administration somewhere in Iowa, sending you a name and you just signed, or did you have any discretion in the matter?

A. Well, as it actually operated, it was more or less of a routine matter as far as I was concerned. We just took what they sent us and fixed up the papers and let it go at that. The question never arose as to [133] whether we could overrule anything.

The Court: Well, what were your duties?

A. My duties were to see, as far as these Lytle and Green workmen were concerned, to see that the papers received were properly completed, the necessary papers there, and then to prepare the official appointment papers.

The Court: If you found one of those papers—found the individual was an alien enemy?

A. We would refuse to appoint him.

(Testimony of M. B. Christensen.)

The Court: Suppose you found one that would not certify to the oath he was not a member of any subversive organization?

A. We would refuse to appoint him.

The Court: Now, after March, 1943, what was your relation with reference to employees on the job?

A. Well, I had nothing further to do directly with these Lytle and Green workmen. However, I continued with respect to all other government employees on the job in the same capacity.

The Court: Well, when you say "Lytle and Green workmen," do you thereby include all of the other contractors who were on the job?

A. Yes, sir, all of the associated contractors.

The Court: When you used the term "Lytle and Green employees" in the selection of the workmen in the summer or season of 1942, did you likewise mean to imply all of the employees?

A. Yes, sir, all of the affiliated contractors.

The Court: That is all. [134]

Q. I understand when the papers came to you, these various blanks filled out, properly filled out, you checked them over to see they were properly checked out, then you issued what you call this official authority, or something, and sent it to who?

A. There were numerous copies, one went to the man himself, and one went to Lytle and Green offices, and then copies to the accounting division in the Washington office.

(Testimony of M. B. Christensen.)

Q. I appreciate you make many copies of these things, but your business really was to see that the papers were in order? A. That is right.

Q. Yes, and if they were in order, then you issued this—what do you call it?

A. Official appointment.

Q. Official appointment? A. Yes, sir.

Q. Why, you considered your duties performed in the matter?

A. Yes, unless the question came up later about a change in his salary or discharge or something of that kind, which is the same thing.

Q. Well, that was reported to you only and then you made the appropriate entries?

A. I wouldn't say that. It was recommended that action be taken and then the official action was taken in our office. It was not a case of their taking the action and reporting it to you.

Q. Well, if they reported a man up in Alaska for a promotion, from a dollar an hour to a dollar and five cents an hour—— [135]

Mr. Sager: Who do you mean by "they?"

Q. (Continuing): ——a dollar an hour, then that matter was recommended by the—first by the Lytle and Green boss on the job, the district engineer there, and then they made up some kind of a report and then you finally got the report. That is the way it happened, wasn't it?

A. The recommendation?

Q. Yes, you finally got whatever it was. It was in the shape of a writing of some kind?

(Testimony of M. B. Christensen.)

A. Yes.

Q. When you got that you then entered it, made appropriate entry and filed it properly?

A. I should call your attention to the fact that as long as it was only a recommendation received from the field, there was no official action had to be taken in our office.

Q. You approved those things as a matter of course, didn't you?

A. Generally speaking, yes.

Q. Now, was there any one, for instance, throughout the entire job, that you turned the district engineer down?

A. I don't recall any.

Mr. Peterson: No.

The Court: Well, you were still in charge of this region in 1943?

A. Yes, sir.

The Court: When the change in the matter of the status of the employees generally other than those directly identified with the governmental agency, the Public Roads Administration or Federal Works Administration, [136] took place, was there a change in the matter of the payment of these employees?

A. I had nothing to do with the payment. I can only say from hearsay there was no change. The checks were issued in the same manner.

The Court: That is, they were government checks?

A. Yes, sir.

(Testimony of M. B. Christensen.)

The Court: That is all.

Redirect Examination

By Mr. Sager:

Q. These recommendations that came to you from Alaska were recommendations of whom?

A. They were signed by Mr. Polk, our engineer in charge of Alaska.

Q. That is, P.R.A. engineer? A. Yes.

Q. It was not a recommendation from the contractors?

A. It also bore his signature, as I recall, and then they were countersigned by Mr. Polk.

Q. Now, you say that in receiving the papers from Sioux City, you merely examined them to see that they were properly filled in. If so, the appointment was issued? A. Yes, sir.

Q. Yet, if you found in those papers that came to you that the applicant did not comply with whatever requirements it may be, would you then turn down that appointment?

A. We would not make the appointment. [137]

Mr. Peterson: Just a minute, this is calling for a conclusion. He has been asked—he said he did not in the practical operation of the thing, through the entire job, did not turn down anybody. Now, it is immaterial to ask him what he would do or might do if some hypothetical situation arose. I don't think it would help the Court.

The Court: The Court is interested in just what power he had, not just what action he took upon a particular situation.

(Testimony of M. B. Christensen.)

Mr. Sager: I think that was the purpose of my question.

The Court: Yes, the objection will be overruled. He may answer.

Mr. Peterson: Let me call Your Honor's attention to the contract. I suppose that will control finally. The contract provides that when an employee is going to be discharged, it shall be at the instance of the foreman, the Lytle and Green man on the job. It is reported to the district engineer. If he approves it, that settles it. That is the contract, and it is the same with the hiring. I am stating what the contract is. It is here.

The Court: He may answer the question.

The Witness: What was the question, again?

The Court: That same question has been asked and answered, I believe.

The Witness: I think I answered it once before. To repeat that, we would not make the appointment until either the deficiencies were corrected—I [138] will say we will not make the appointment unless all of the deficiencies in the papers were corrected. If they were not corrected, the appointment would not be made.

Q. Well, if the papers showed some failure on the part of the applicant to comply, which could not be corrected, his status would not permit——

The Court: I think he has answered that—covered that.

Mr. Sager: That is all.



(Testimony of M. B. Christensen.)

Recross Examination

By Mr. Peterson:

Q. As a matter of fact, all you did was to correct these papers and see they were in order, isn't that correct, in the final analysis of the matter?

A. No, it is not correct. There were no appointments made until after we had issued the paper in our office. It was merely a recommendation to make an appointment.

Q. You checked them, and if they were in order you issued an authority for the man to go to work?

A. Yes.

Mr. Peterson: That is all.

(Witness excused.) [139]

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C. G. POLK,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name, please?

A. C. G. Polk.

Q. And what is your present position or occupation?

A. I am a civil engineer with the Public Roads Administration.

Mr. Peterson: Kindly speak a little louder, Mr. Polk, please.

(Testimony of C. G. Polk.)

A. I am a civil engineer with the Public Roads Administration.

Q. How long have you been with the Public Roads Administration?

A. About twenty-eight years.

Q. And where were you during 1942?

A. In Alaska.

Q. And what was your position and duties there?

A. Well, I was in charge of all of the field activities of the Alaska Highway within Alaska, for the Public Roads Administration.

Q. What was your title up there, Mr. Polk?

A. Assistant construction engineer.

Q. And who was your superior, if any, there?

A. My direct superior was the construction engineer, who was located in White Horse. He in turn reported to the district engineer in Seattle.

[140]

Q. Now, did you have anything to do with the construction of the Alaska Highway under Lytle and Green and associated contracts?

A. Yes, I had general supervision of it.

Q. And where were your headquarters while that job was going on?

A. Well, in 1942 they were at a small post office called Gulkana.

Q. When did you go up to Alaska, first?

A. In May, of 1942.

Q. Are you familiar with the various associate contractors under this Lytle and Green management contract?

A. Yes, I am.

(Testimony of C. G. Polk.)

Q. Did you know the contractors themselves?

A. Yes, sir.

Q. And their organizations?

A. Yes, sir.

Q. How many contractors were there?

A. There were fifteen in a total, including Lytle and Green.

Q. And what generally were the——

The Court: That is fifteen on this 155 mile job that is involved here?      A. Yes, sir.

Q. What generally was the type of work done by these contractors?

A. Well, the work is that of constructing the road, excavation of material, the clearing of the right of way, installing drainage structures, bridges, and so forth.

Q. Did all the contractors do the same sort of work?      A. No, they did not. [141]

Q. To what extent was there a difference in their work?

A. Some of them were purely bridge contractors—constructed nothing but bridges. There were four of them.

Q. How many of those?      A. Four.

Q. And which ones were they?

A. The firms of Duvall & McKinney, Western Engineering Company, Weldon Brothers.

Q. And then, what were the others?

A. Then we had the—I believe it was nine grading contractors. They did the dirt work, you might say, clearing out the right of way.

(Testimony of C. G. Polk.)

Q. Now, about how many men were on the job altogether during 1942?

A. There were about twelve hundred assigned to the contractors. That is, exclusive of my own force.

Q. You had a force there, yourself?

A. I had, I believe, about a hundred and fifty.

Q. What did your force consist of?

A. Mostly engineers, and also auditors, equipment inspectors.

Q. Now, approximately how many men would each road contractor have?

A. About sixty.

Q. And each bridge contractor?

A. About ninety.

Q. Were you out on the job to a substantial extent?

A. Well, yes, quite often, although mainly office work.

Q. Do you know whether or not the men there on the job were Civil Service appointees? [142]

A. Oh, yes, they were.

Q. Were there any of them that were not?

A. The contractors themselves were not, and——

Mr. Peterson: I did not get your last answer.

The Court: The contractors themselves were not.

Mr. Peterson: Thank you.

A. (Continuing): And in those instances where

(Testimony of C. G. Polk.)

the contractors were not in Alaska, they maintained a representative there. That is, on the contractor's pay roll, he was not Civil Service.

Q. How many of the contractors had that sort—

A. I can only remember of two.

Q. And in all the other cases, the contractor himself was there? A. Yes.

Q. And then, except for the contractors themselves, or in the two cases where they had an agent, do I understand all of the rest of the men on the job were under Civil Service?

A. That is right, as applying to these unit contractors, Lytle and Green, they had two men, I believe, that were not Civil Service.

Q. How much—generally about how much of an organization did Lytle and Green have up there?

A. About two hundred and fifty men.

Q. That would be included in the twelve hundred over all? A. Yes.

Q. Now, Mr. Polk, can you tell us something about the supervisory setup of—well, we will confine it first to [143] the bridge contractors. What I am trying to get at is, who gave the orders and who was on the job directing the work?

A. Well, the bridge outfits—

The Court: I think we will take the morning intermission now. It is time for the morning recess, of fifteen minutes.

(Recess.)

(Testimony of C. G. Polk.)

Mr. Sager: If Your Honor please, with respect to Defendants' Exhibit A-9, certified copy of the records of the Employees' Compensation Commission, if it can be stipulated that during the period from June 17th to August 31st, 1942, the period of the insurance coverage here, that there were in fact thirteen men who were under one or the other of these contractors on the job in Alaska who were injured on the job, and who were compensated for their injuries or received medical aid through the Federal Compensation Commission, if Mr. Peterson will agree to that further stipulation——

Mr. Peterson: We will stipulate to the fact, but subject to our objection as irrelevant and immaterial in this matter.

Mr. Sager: We will withdraw our offer.

The Court: I am not understanding from that stipulation, however, that the contract of the insurance involved in this case covered the cases of these thirteen or any one of them?

Mr. Peterson: No, that is understood. [144]

Mr. Sager: This was not compensation insurance, Your Honor. It was only covered liability of third parties.

The Court: But, the injuries were not injuries that grew out of the negligence of some third party this policy of insurance would have covered instances——

Mr. Peterson: We will agree that they were injuries that did not come under the coverage of this policy.

(Testimony of C. G. Polk.)

Mr. Sager: Yes, as a matter of fact the policy excludes any damage or any injury to employees on the job.

Mr. Peterson: That is compensation. It does not, as I construe this policy. For instance, the employee of Smith as a third party, with respect to the employee of Jones and some other unit contractor——

Mr. Sager: I don't agree with that.

Mr. Peterson: I understand. I will stipulate that these thirteen who received injuries or compensation, the injuries and compensation were not such as came under the coverage of the policy for which this premium is claimed. You will agree to that, won't you?

Mr. Sager: Yes. In other words, they were not entitled to come back to the insurer here and claim compensation from him.

The Court: Very well, anything further now on your direct examination?

Q. I think my last question to you, Mr. Polk, was to tell us generally the manner in which orders and directions [145] as to the actual work itself was given from the original source, down?

A. Well, naturally they were given by one of my resident engineers to the—either the contractor himself or one of his representatives, that is, the superintendent under him, whoever was in direct charge of that activity.

Q. Now, before you go beyond that, if the order was given to the contractor, that, of course, the

(Testimony of C. G. Polk.)

contractor was not a Civil Service employee, is that correct?      A. That is right.

Q. Were the contractors' superintendents Civil Service employees?      A. Yes.

Q. All right, and from the superintendents, where did the order or direction go?

A. It would go to a foreman who would carry out the order.

Q. Were there any bosses or such under the foremen?

A. Ordinarily not. Well, I will change that a little there. There were different grades of foremen, yes, usually.

Q. Suppose you explain that to us with respect to each type of contractor.

A. Well, in the bridge contracts—it applies in general to all the contractors. Each organization maintains two superintendents. Presumably—theoretically one for the day shift and one for the night shift, and also they maintain what is known as general foreman who look after the certain activity, for instance, the bridge contractors had various camps, sawmill camps, the bridge camp, and second bridge camp. These would be in charge [146] ordinarily of a general foreman, and under him they would have one or two lesser foremen. We call them straw bosses.

Q. Now, were the foremen and the straw bosses Civil Service appointees?

A. Yes, sir.



(Testimony of C. G. Polk.)

Q. And of course the workmen themselves, they were Civil Service appointees? A. Yes.

Q. Who determined where a particular contractor would work?

A. That was arrived at through joint agreement with representatives of Lytle and Green and myself, or my assistants.

Q. Now, did you have a government engineer with each of the contractors?

A. Most of them, yes.

Q. Mr. Polk, at my request you have prepared a sketch of the part of the highway within Alaska, have you? A. Yes, sir.

Q. I will show you what is marked Defendants' Identification A-10, and ask you if that is the sketch you prepared?

A. Yes, that is it.

Q. Now, this sketch shows the portion of the highway from Slana to the Canadian border?

A. Yes, sir.

Q. And the estimated distance of that portion of the highway is 155 miles? A. Yes, sir.

Q. Was the highway segregated into portions or sections? [147] A. Yes.

Q. And you have shown that on the sketch?

A. Yes.

Q. What sections comprise the estimated 155 miles from Slana to the border?

A. Section A-1 and Section A-2.

Q. Now, when you went up there—by the way,

(Testimony of C. G. Polk.)

about when did you start actual work on the highway?

A. That is, the actual construction, not arrival of the crew?

Q. That is right.

A. It was on the 7th day of July, 1942, was the first operation.

Mr. Peterson: May I ask you to speak louder, please, Mr. Polk?

A. (Continuing): It was the 7th day of July, 1942.

Mr. Peterson: Thank you.

Q. And where did you start work at that time?

A. Well, that particular activity was on Section A-3, in the vicinity of Gulkana, Alaska.

Q. Is that a part of the road from Slana to the Canadian border?      A. No.

Q. When did you get on the—any portion of the highway from Slana to the border?

A. About August 1st, of that year.

Q. And what contractors were assigned to that portion of the highway then?

A. The firms of E. P. Dusenberg and Weldon Brothers.

Mr. Peterson: The last name? [148]

A. Weldon Brothers.

Q. How long did they work on that section of the highway?

A. The remainder of the season.

Q. Did any other contractors work on that por-

(Testimony of C. G. Polk.)

tion of the highway between the period, whenever they started, July 7th and August 31st?

A. No.

Q. Where were they working, the other contractors?

A. They were working on Sections A-3 and Sections A-4.

Mr. Sager: I will offer this sketch in evidence, Your Honor.

Mr. Peterson: I wonder if we can stipulate as to the amount there, to save encumbering the record. The Defendants' Exhibit No. 10 is objected to as irrelevant and immaterial.

Mr. Sager: I think Your Honor may want to see it.

The Court: It will be admitted. The objection will be overruled, as illustrative of the witness' testimony.

(Whereupon, sketch referred to was then received in evidence and marked Defendants' Exhibit No. A-10.)



← To Fairbanks

Big Delta Junction

Richardson Highway

To Anchorage and Valdez

Gulkana

Section A-3  
Est. length 65 mi.

Section A-4  
Est. length 110 miles

Glana

Section A-2  
Est. length 65 mi.

\* Tonacross  
Tok Junction



Section A-1 Estimated length 90 miles

No.  
DEPENDANT EXHIBIT **A-10**

SEP 7<sup>th</sup> 1944

adm.

NO. **10000**  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
**FILED**

MAR 20 1945

**PAUL P. O'BRIEN.**  
CLERK

Alaska  
Yukon Territory

Sketch showing Plan of  
Aerial Photo S 4 1 15



(Testimony of C. G. Polk.)

Mr. Peterson: Your Honor, do you mind if we ask the witness to step down for a consultation? We may stipulate here.

The Court: Yes, he may do so.

Mr. Sager: Now, I think we can stipulate, Your Honor, that the pay roll of Dusenberg Brothers, contractors, during this entire period, June 17th to [149] August 31st is \$102,380.24.

The Court: How much was it?

Mr. Sager: \$102,380.24; and the pay roll of Weldon Brothers during the same period was \$71,357.66.

Q. Just what was the title of Dusenberg—I mean the contract name?

Mr. Peterson: Are you through with that stipulation?

Mr. Sager: Well, yes.

A. E. M. Dusenberg, Inc., I believe.

Mr. Peterson: Your Honor, we will stipulate to the facts stated.

Mr. Sager: Now, I want to——

Mr. Peterson: Do you want to add something to it?

Mr. Sager: Yes, this of course was the pay roll of the Civil Service appointees, as well as the one—well, that would be it entirely, wouldn't it, Mr. Polk?

A. That is right.

Q. I mean, in these pay rolls, there wouldn't be a pay roll of a non-Civil Service appointee on these two contracts?

A. No, it would not.

(Testimony of C. G. Polk.)

Q. So, this entire pay roll will be Civil Service appointees?

A. Yes, sir.

Mr. Peterson: We will stipulate to the facts, but object on the ground that it is irrelevant and immaterial, and on the further ground that it is not within the issues made by the pleadings. If it is intended to prove we are not entitled to this premium by reason of the fact that the work was not done on the 155 miles, if [150] that is the intention, then there is no issue of that fact made by the pleadings. The only issue made by the pleadings is a mistake in stating the facts, and that they thought and assumed these men were employees of the contractors, instead of Civil Service employees.

The Court: Well, I understand you stipulated.

Mr. Peterson: Stipulated to the facts, Your Honor, but my objection is to the relevancy and materiality of it, and on the further ground it is not within—tending to prove a fact not made an issue by the pleadings.

The Court: The objection will be overruled and exception allowed.

Mr. Peterson: Note an exception.

The Court: I would like to have this matter somewhat cleared up. The pleadings do not raise the issue of a mistake as to the time, just merely raises the issue as to the nature of it, or as to the status of individuals whose pay roll was submitted.

Mr. Sager: Well, that is the only purpose of the second affirmative defense. The issue raised



(Testimony of C. G. Polk.)

by that defense. Yes, I am still insisting that the first affirmative defense opens up the entire question, whether or not this is an account stated and the reason I offer this, Your Honor, is that if there is not an account stated, then of course the burden of proving the amount of premium is upon the plaintiff. In other words, he first has the burden of proving an account stated. If he does not sustain that burden, he then has [151] the burden of proving the amount of premium due, and as I say, I still insist that the question of account stated is still an open issue, and under our first affirmative defense the circumstances alleged there, proof offered in support of it that there is.

The Court: The Court rules against you on that. Your situation would be somewhat different if the government were an intervenor here, but the status of the government is, in this case, that it is not in the case at all.

Mr. Sager: That is right.

The Court: Well, as a matter of fact, the Court is justified in taking judicial notice that the United States Attorney is appearing here by the direction of the Department of Justice, for the purpose of protecting the Government's interest, and that the defendant has more or less assumed the attitude he is more or less in a position of a nominal defendant, and as far as the defendant is concerned, he is bound himself by creating as to himself an account stated.

(Testimony of C. G. Polk.)

Mr. Sager: Well, I do not agree with the Court's finding on that, or position on it, but I understand that is the issue.

The Court: But, I will permit you to go ahead and make your proof in reference to whether, as I understand this witness, the job covered by this contract of insurance, according to his testimony, was not actually undertaken, whether the employees be Civil Service or otherwise until some time late in July.

Mr. Sager: Well, I would not say that because, [152] of course,—

The Court: Well, he has testified the 17th of July.

Mr. Sager: The 7th, I believe.

The Court: No, the 7th was work on another section, but not on either of these sections.

The Witness: On this first—

Mr. Sager: Maybe I better clear that up.

Mr. Peterson: Take an exception to the ruling of the Court.

Q. Mr. Polk, you actually started work on the road itself on July 7th? A. Yes, sir.

Q. And at that time did you start on either of these sections? A. No, we did not.

Q. On the portion of the road from Slana to the borders? A. No.

Q. When did you start on that?

A. About August 1st.

Q. I see, and at that time only these two con-

(Testimony of C. G. Polk.)

tractors, Weldon Brothers and Dussenberg Brothers went upon that section?

A. That is right.

Q. And were there any other contractors on that section from Slana to the border at any time during the period from June 17th to August 31st?

A. No.

Mr. Sager: I think that is all. [153]

Cross Examination

By Mr. Peterson:

Q. Mr. Polk, you arrived in Alaska, I understand, some time in May, the date is not important, 1942? A. Yes, sir.

Q. And you had engineers, and this was a kind of hurry-up job, and you were making preparations to get it going, I take it? A. Yes, sir.

Q. Now, as I understand your—I presume you had this contract that was made by the Federal Works Agency or Federal Works Administrator, with Lytle and Green? A. Yes, sir.

Q. Before you at all times in connection with the matter? A. Yes, sir.

Q. Is that correct?

A. As soon as it was sent to me.

Q. Beg your pardon?

A. We did not receive a copy of it. I didn't have a copy of it when I went up there.

Q. But, you did——

A. It came later, yes.

Q. Yes, and that is the proposition you were working under, of course? A. Yes.

(Testimony of C. G. Polk.)

Q. Now, and that was true also, was it not, with respect to the unit contractors?

A. Yes, sir.

Q. They did not have independent, but they had direct contracts with the government? [154]

A. Yes, sir.

Q. But they were subject to the general supervision of the project manager—that is, Lytle and Green Company?

A. Yes, sir.

Q. And they in turn, representing the government, the owner so to speak. You gave the instructions to Lytle and Green, that is, their foreman or superintendent or representative on the job, is that correct?

A. To Lytle and Green's foreman.

Q. You were not their foreman, but their representative?

A. The contractors or their representatives, or——

Q. Yes, you did not go and tell the pick-and-shovel man what to do?

A. No, no.

Mr. Sager: Let him finish his answer.

A. (Continuing): Of course not.

Q. But when you wanted a piece of work accomplished, I take it, you took it up with somebody who presented Lytle and Green, or somebody who represented the unit price contractor and told him what you wanted done, or your engineers did?

A. Well, ordinarily our men would take it up with the foremen.

(Testimony of C. G. Polk.)

Q. Well, I want to get—yes, somebody who had charge of the work for the unit price contractor, or project manager?

A. Somebody in authority.

Q. Somebody in authority? A. Yes.

Q. Yes. Now, there were about twelve hundred men employed [155] by Lytle and Green and the unit contractors, is that correct?

A. I think I said twelve hundred awhile ago, but after a little more thought were were a few more than that. There probably would be thirteen hundred.

Q. Probably thirteen hundred. That is not important anyway, that number, whether there was twelve hundred or fifteen hundred were working over what area—I mean, in length, of the highway, we will say, in——

A. Well, that would be the sum of the distance is shown on those four sections on that Exhibit 10. That would be about three hundred and fifteen miles.

Q. About three hundred and fifteen miles, and I presume each unit price contractor had proper camps established to take care of his men?

A. Well, they were camps, but they were not proper——

Q. Well, they had camps anyway. We will let it go at that. A. Yes.

Q. And they were put up I assume by the contractors? A. Yes.

(Testimony of C. G. Polk.)

Q. They had more or less transportation in there, did you not? A. Yes, sir.

Q. And that was of course all heavy materials, at least was by truck? A. Yes.

Q. And who attended to the transportation job?

A. There was one contractor assigned to transportation.

Q. A man named Hoke?

A. That is right. [156]

Q. Yes, and as the work progressed, I assume you used part of the finished or partly finished roadway for the purpose of transporting over it, was completed, I assume? A. Yes, sir.

Q. And that continued right along until the job was completed, I assume? A. Yes, sir.

Q. Now, that—all that country up there was through a virgin country, so to speak, was it not?

A. Yes, sir.

Q. It was pretty much the same, as far as that is concerned, probably pretty much the same with respect to road construction? A. Yes.

Q. You didn't have much—it was tunder or those muskeg—some of it was tunder and muskeg bogs, and other was just ordinary ground, or was there any ordinary ground up there?

A. Oh, yes, there was a lot of ordinary ground. There was very little tunder under the road. We bypassed that.

Q. That involved cutting of timber and falling of trees and clearing of right of way and grading and excavating and blasting, and all those things?

(Testimony of C. G. Polk.)

A. Yes.

Q. Yes. Now, you say the Lytle, if I understood you correctly, that is, if I attempt to misquote you you can correct me, I understand that the Lytle-Green organization itself had about two hundred and fifty men?

A. I may have been——

Q. Well—— [157]

A. ——a little too many on that. It was probably less.

Q. Maybe two hundred, whatever it was?

A. Yes, sir.

Q. What were those men engaged in, not in detail, but generally?

A. In purchasing, in preparing vouchers, in warehousing and all the dozens of different——

Q. Do they do any grading?

A. No, no grading.

Q. Did it take two hundred and fifty men to do the clerical work and warehousing for this two hundred, or whatever it may have been?

A. Yes, it did.

Q. Various unit price or unit, rather, contractors employed cooks and maintained cook houses to feed the men?

A. Yes, sir.

Q. Yes, and Lytle and Green, I presume, did the same thing as far as their employees were concerned?

A. Yes.

Q. And this man Hoke was under the—he was a unit price contractor, or rather, he was a man brought in there by Lytle and Green and was under them, is that correct?

(Testimony of C. G. Polk.)

A. I didn't get that last question.

Q. The man Hoke, the individual, was a man brought in there by Lytle and Green, was he not?

A. Well, he was—his contract was the same as the others.

Q. I understand, but he was on the same basis as the other unit contractors under Lytle and Green, except he had the transportation end of the thing?

A. That is right. [158]

Q. And what character of equipment generally was used up there, bulldozers, and shovels?

A. Bulldozers and carryalls mainly.

Q. Generally dirt-moving equipment?

A. Yes, and trucks.

Q. More or less blasting, I assume, carried on at different places?

A. Very little blasting.

Q. Wherever it was necessary it was done, of course?

A. Yes.

Q. Now, each unit man, I take it, attended to his own crew—each unit contractor had his own crew of I think you said something like sixty?

A. Yes, sir.

Q. And he provided a superintendent or foreman to direct those men in their work, is that correct?

A. Well, he recruited these men. They were all Civil Service.

Q. Well, let's forget about the Civil Service business, I am not asking you about.

A. No.

Mr. Sager: Well, I don't think it ought to be forgotten.



(Testimony of C. G. Polk.)

Mr. Peterson: I understand, but he recruited the men and brought them up.

Mr. Sager: Referring to employees of the contractors right along, probably making a distinction.

Mr. Peterson: Well, I didn't mean to say—I was not speaking in a legal sense they were employees.

Q: But, you didn't have anything to do with recruiting these [159] men? A. No.

Q. Down in Iowa and Nebraska? A. No.

Q. Each unit price contractor—I just want to start into another part.

The Court: Finish your question.

Q. Each unit price contractor brought his own crew in there? A. In general, that is true.

Q. Yes. And do you know generally where those men were employed—were from, in your activity around there? A. The source?

Q. Yes. A. In Iowa, the State of Iowa.

The Court: We will take an intermission now until 2:00 o'clock this afternoon.

(Recess.)

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2:00 o'clock P. M.

The Court: You may proceed, now, Mr. Peterson.

By Mr. Peterson (Continuing):

Q. Mr. Polk, these unit price contractors—or not unit price, pardon me, but the unit contractors

(Testimony of C. G. Polk.)

Lytle and Green furnished considerable of their own rolling stock and equipment, did they not?

A. A considerable amount, yes, but not all of it.

Q. And as I understand under this contract, the Lytle and [160] Green, who were—they were referred to as project managers, were they not?

A. Yes, sir.

Q. Yes, and I understand under the system of operation there, they allocated the portions of the work to these respective individual contractors, and those allocations I assume had your approval?

A. Well, they allocated.

Q. Beg pardon?

A. They allocated the contractors to the various sections, subject to our approval, yes.

Q. Yes, and they, the Lytle and Green organization, supervised and controlled the individual contractors with respect to the management of the operations, did they not, and the work performed by them?

A. Well, theoretically, maybe they did, but actually they did not. They did not have the personnel.

Q. Beg pardon?

A. No, that is not entirely true. They did not have the personnel to supervise all the various activities.

Q. Well, so far as they had the personnel they did?

A. Well, subject to approval of the Public Roads, yes, that is true.

(Testimony of C. G. Polk.)

Q. And they maintained a central office there, did they, under the contract? A. Yes, sir.

Q. There has been a contract introduced in evidence here—I don't know what the exhibit here—

The Court: A-6, Defendants'.

Q. By the government, and is the contract between—let me [161] show the witness that, please. I think maybe you can tell by looking at this copy. I would rather have you look—

The Court: The Court has one copy. That is the copy of the contract between the plaintiff and the defendant.

Mr. Peterson: That is the one I wish.

The Court: Between the defendant and the government?

Mr. Peterson: Yes, that is the one, Your Honor. I want to exhibit it to the witness, please. Just let the witness look at that, I know what it is.

Q. The front sheet is not a part of it.

A. Yes, I understand.

Q. That is Exhibit A-2, is it, Exhibit A-2?

A. A-6.

Q. A-6. Well, I beg your pardon, this is a copy of the contract you had up there?

A. Yes, sir.

Q. And I presume in the performance of your duties you followed that contract, did you not?

A. As much as possible.

Q. Yes. Well, you did not change the prices of anything? A. No.

(Testimony of C. G. Polk.)

Q. You did not change the arrangements—you did not substitute some person who is not a party to this contract—who was not a party to this contract, for one who was? A. No.

Q. This generally controlled you, didn't it?

A. That is right. [162]

Q. Yes. You aimed to carry that out in the performance of your duties? A. Yes.

Q. Now, this contract provides, for instance, page 3, the project manager—that is Lytle and Green, shall supervise and control the individual contractors with respect to the management of their operations, the work performed by them, the furnishing and handling of their equipment and the supervision of the employment and discharge of their personnel. Is that—were those the functions of the project manager? A. Yes, sir.

Q. And it was carried on in that manner in accordance with the contract, wasn't it?

A. In most instances in the case of the supervision of the contractors they had, but one engineer up there, and he couldn't very well cover three hundred and some miles.

Q. Yes. Well, they sent some four or five men out to put a blast under a stump, you did not interfere with that business? A. No.

Q. That was up to them, so to speak?

A. That is right.

Q. Now, did they provide and maintain a central office up there, and operate that? A. Yes, sir.

Q. I beg your pardon? A. Yes, sir.

(Testimony of C. G. Polk.)

Mr. Peterson: I wish you would speak a little louder if you will, so everybody can hear you. [163]

A. Very well.

Q. Now, did Lytle and Green provide and maintain and operate a central equipment repair depot?

A. Not during that period.

Q. Well, did they maintain a depot?

A. Yes.

Mr. Sager: Well, Mr. Peterson, the defendant was not during this period. There might have been some other time.

Mr. Peterson: Well, the contract provision I think is going to control, anyway.

Q. And there were repairs there, made between June 17th and August 1st, to trucks and various equipment?

A. To a certain extent most of them were performed by the individual contractors.

Q. Well, I am not talking about that. I am asking you if there were repairs made to trucks and equipment as to either the individual contractors or Lytle and Green?

A. To the individual contractors.

Q. Well, the individual contractors, if you want it that way.

A. Lytle and Green did not have any equipment of their own.

Q. All right, and those repairs were made by the individual contractors under their supervision?

A. During that period I believe they were.

(Testimony of C. G. Polk.)

Later on, Lytle and Green maintained a repair shop of their own.

Q. Yes, and they selected the men to do the repair and welding, or whatever it might have been, and the material to be used, and it directed the details of the work, that is correct, isn't it? [164]

A. No, I don't think that is right. That was up to the individual contractor.

Q. Well, I am talking about the individual contractor.

A. Well, if you were talking about that, that is correct.

Q. That is correct, and that is the way the thing was carried on all of the way through, as a matter of fact, wasn't it?

A. When I refer to contractors, I mean the contractors' organization, many of those contractors were not on the job. It was their organization that carried on.

Q. I understand, but from the beginning on June 17th, 1942, until the completion of the job, the general mechanics were performing the work and accomplishing and getting it done, and it was the same right from the beginning on through, wasn't it? A. I will agree to that, yes.

Q. Yes, and you were familiar on how the pay rolls were made, were you not, from the beginning to the end? A. Yes, sir.

Q. And those were all made by government checks, there wasn't any difference in that arrangement?

(Testimony of C. G. Polk.)

A. They were paid by government checks, yes.

Q. Yes. Now, as I understand the situation, each of these unit price or unit contractors was responsible for his own equipment, keeping it going?

A. Yes, sir.

Q. Yes. How many men did you have on this supervising this thirteen hundred men that you have referred to?

A. Well, I had a total organization of nearly one hundred and fifty men. [165]

Q. You had a hundred and fifty men?

A. But, they were not all supervisors.

Q. How many were supervising this thirteen hundred man job that Lytle and Green were doing?

A. Oh, probably forty.

Q. Forty. That was fifteen contractors?

A. Yes, sir.

Q. And you had three men supervising each contractor, is that correct?

A. No, on some of them they—we didn't have any.

Q. Then, Lytle and Green had somewhere between two hundred and two hundred and fifty men supervising?

A. Well, I will have to admit I made an error when I said Lytle and Green's organization was two hundred and fifty men.

Q. You may correct it.

A. I would say it was closer to a hundred and fifty.

(Testimony of C. G. Polk.)

Q. That they had a hundred and fifty men supervising this thirteen hundred men?

A. They were not all supervising it, their entire organization, yes.

Q. Well, bookkeepers and auditors. Now, if I understood you correctly, your direct testimony this morning, you said that the engineer—and when I say engineer I refer to the district—the government engineer, the man under your employ would give instructions, we will say in the morning to the foreman or superintendent or engineer of one of the unit contract men, is that correct?

A. Whoever was on the job.

Q. Yes. [166] A. Yes, that is generally.

Q. You did not go to the individual workman, the pick-and-shovel man and give him any orders?

A. No.

Q. And then you would look, I assume to the foreman or a man in authority, whoever the order was given to, to carry out the order?

A. Yes, sir.

Q. Yes——

Mr. Peterson: I think that is all.

The Court: I wanted to ask you a few questions. This Lytle and Green contract, for the particular part of the road here involved, was it in the nature of an over all contract or the various individual contractors or associate contractors?

A. Yes, sir.

The Court: And the estimated cost of the work of eight million some dollars, did that include



(Testimony of C. G. Polk.)

likewise the estimated cost on each of these associated contractors?

A. Yes.

The Court: Jobs?

A. It included all costs, as I remember, except fixed fee payments.

The Court: Then, in these associate contractors' contracts, where there is an estimated cost given, the aggregate of those estimated costs was—with perhaps some other items, would make the eight million dollars?

A. Yes, sir.

The Court: But these associated contractors [167] or individual contractors, whatever we care to designate them, each had a fixed fee in addition to the fixed fee paid Lytle and Green?

A. Yes, sir.

The Court: And Lytle and Green's work was a supervisory work?

A. Yes, sir.

The Court: Then, do I understand by that, that Lytle and Green had no direct employees doing the actual physical work of building the road, or the bridge, or whatever it might be under construction?

A. That is true, they had no employees engaged on actual work.

The Court: Have you seen this document that is marked—I can't recall the number of it offhand, which is submitted as a pay roll on this job, marked Plaintiff's Exhibit 10?

(Testimony of C. G. Polk.)

A. Yes, sir, it is not a pay roll, though. It is a summary of pay rolls.

The Court: By that do you mean that it does not necessarily include all of the work, or includes work in addition to that done on this section of the highway that is designated 1-A, and 2-A, or A-1 and A-2?

A. It is a summary of all the pay rolls incurred on the job in Alaska, between the period of June 17th and July 15th, but it is not an actual pay roll.

The Court: Well, did Lytle and Green have previous contracts on other sections of this highway?

A. No.

The Court: Nor subsequent contracts? [168]

A. No.

The Court: That is, to your knowledge?

A. No, they had no such contracts.

The Court: So their only interest in Alaska was in the construction of this section of the highway known as A-1 and A-2?

A. That contract was later modified, I believe, the following year—in the year 1943, but incidentally——

The Court: 1943?

A. Yes, sir, contracts for construction of airports throughout Alaska, under the—I believe it was same aeronautics authority with which I am not familiar.

The Court: If I understood your testimony this forenoon on direct examination when you submitted your own sketch of the highway, that was

(Testimony of C. G. Polk.)

there under construction, I understood you to say there was no work actually engaged in, in connection with Section 1-A or A-1 and A-2 until after some date in July?

A. August 1st was the day.

The Court: Or, until August 1st?

A. Yes, sir.

The Court: Well, if this document here, Plaintiff's 10, indicates payment made to workmen and employees prior to August 1st, it could not have been in connection with this job covered by the contract between the government and Lytle and Green, which is Defendants' Exhibit 1, or A-6 in this case?

A. That is true, the pay roll as indicated there does not cover any work done on Sections A-1 and [169] A-2, other than you might say overhead of pay roll of the men en route to Alaska.

The Court: Were you the district engineer or assistant district engineer in charge of this work?

A. My title was assistant construction engineer, and I had charge of the work in Alaska, that is right.

The Court: Well, did you or to your knowledge did any of your superiors either approve or require as reasonably necessary for the protection of the government, an insurance such as is here involved?

A. I do not think I am qualified to answer that. That was the function of our district office and I had nothing to do with it.

(Testimony of C. G. Polk.)

The Court: You had nothing to do with the insurance?

A. I had nothing to do with the insurance.

The Court: The reason I asked the question, in the form I did, is because of the copy of the contract introduced here, which is Defendants' Exhibit A-6. In Article 2, under the head of "Cost of the Work", subsection "H", provides that:

"Premiums on such bonds and insurance policies as the district engineer may approve or require as reasonably necessary for the protection of the government or the project manager" shall be items of cost or expense to be charged against the project, and the term district engineer would not necessarily include you, then?

A. No, it would not. [170]

The Court: Well, who would it?

A. Mr. Bright, is his name.

The Court: Did you have anything to do with certifying pay rolls on this project?

A. I certified to most of them, yes.

The Court: If I understand you correctly, now, you say you certified none prior to August the 1st, because there were none on the project?

A. Well, there were pay rolls covering the Civil Service employees that were sent to Alaska and assigned to these contractors, commencing from the time they left Iowa, which was, I believe, in the early part of June.

The Court: And did you certify those?

A. I did not certify any pay rolls prior to July

(Testimony of C. G. Polk.)

16th, was the first pay roll I certified. We prepared them, or caused them to be prepared there in our office.

The Court: But, at that time actual construction had not begun on these sections?

A. Not on sections A-1 and A-2.

The Court: Well, those were the only sections that are involved here, apparently? A. Yes.

The Court: I think that is all.

Mr. Peterson: May I have the policy of insurance that was introduced here?

By Mr. Peterson (Continuing):

Q. Mr. Polk, as I understand there was no other contract, or was there any other contract between the government [171] and Lytle and Green in effect between September—or June 17th, 1942 and September 1st, 1942, other than the contract, Exhibit 6, which you have examined?

A. That is right, as far as Public Roads is concerned.

Q. Yes, that is the only contract. They have some contracts now for airports and one thing and another of course.

A. I said they had then, but not on public roads.

Q. Now, just for convenience and to save time, I am going to ask you to read the endorsement No. 1 on the policy, Plaintiff's Exhibit 4. Read that list, having in mind after you have read that, I am going to ask you whether or not there were any other sub-contractors or unit contractors, or what-

(Testimony of C. G. Polk.)

ever you want to call them, on this job, between September 1st, or between June 17th and September 1st, '42?

Mr. Sager: Mr. Peterson, you are referring to the policy itself?

Mr. Peterson: I am referring to the policy which is in evidence.

Mr. Sager: The insurance policy?

Mr. Peterson: Yes.

The Court: The question is whether there are any other sub-contractors or unit contractors?

Mr. Peterson: Other than those names.

A. There were none other.

Q. Those comprehend and include all of them?

A. Yes, sir.

Mr. Peterson: Thank you.

Q. I don't know whether you are able to tell us or not, you [172] understood, of course, that the pay of these men begun down in Iowa and Nebraska, or wherever they were recruited?

A. That is correct.

Q. Yes, and so far as pay rolls then were concerned, you had nothing to do with certifying those, or did you?

A. Yes, in a way.

Q. Well, were you down there?

A. Well, neither were the men. It was after they left Iowa, they were enroute to Alaska.

Q. Well, I understand——

A. The pay rolls were all prepared in Alaska.

Q. They were all prepared up there. Just how was this pay roll business handled, what is the first

(Testimony of C. G. Polk.)

you were furnished, the data by the unit contractor, or your office?

A. They furnished the data to Lytle and Green, their organization, who prepared the pay rolls, following which we audited them.

Q. Yes. What you received, you received from Lytle and Green? A. Yes.

Q. Because they were the general supervisory management contractors? A. Yes.

Q. And you acted on that information?

A. Yes, sir.

Q. Your office. I suppose those matters of audits and things of that kind, you left that to your auditors and others under you? [173]

A. Mostly, yes.

Mr. Peterson: Yes.

The Court: The Court will take a short recess at this time of fifteen minutes.

(Recess.)

Q. Now, I understand, Mr. Polk, that the actual moving of earth and material and so on commenced on July 7th on this job?

A. Yes, that is true.

Q. Yes. Up until that time men and equipment were being moved in and gotten in there. is that correct? A. Yes, sir.

Q. Yes. Now——

The Court: Well, let me get this straight. I have got a note here. I thought in answer to my question work actually commenced August the 1st.

(Testimony of C. G. Polk.)

A. Work began on August the 1st on Section A-1 and A-2, but work started on July 7th on another end of this road, the other end of the Alaska road.

The Court: We are only concerned with Section 1-A or A-1 and A-2.

A. Well, then, may I correct my statement, then, August 1st then was the date work started on Section A-1 and A-2.

Mr. Peterson: Yes.

Q. And at that time there was—the pay roll was begun as I understand you, when the men were recruited down in the States, is that correct? [174]

A. Well——

Q. Well, do you know, now?

A. They didn't go on the pay roll until they actually left Iowa.

Q. I understand, but when they got on the train, did you know then they went on the pay roll, didn't they? A. Yes.

Q. Then they were on the pay roll on the moving period and travel up and getting up there?

A. Yes.

Q. And getting into a bunk house, until they were ready to go to work? A. Yes.

Q. Yes, that is correct, and they were brought up there under this contract, Exhibit 6?

A. Yes.

Q. That is correct. Now, there wasn't anything done any place, anywhere, until July 7th, 1942, is that correct?



(Testimony of C. G. Polk.)

A. As far as the road is concerned, yes.

Q. Yes, and then after that period there were men coming in, I assume, and worked?

A. Yes.

Q. Yes, and they were recruited down in the States? A. Yes, sir.

Q. And their pay commenced down in the States? A. Yes, sir.

Q. That is correct, and there was equipment being moved in from Tacoma and Seattle and points in Iowa that kept coming along for a time?

A. Yes. [175]

Q. And there were employees necessary of course, outside of Alaska, in connection with marshalling and getting ready the supplies and equipment and so on, and getting it up there?

A. Yes.

Q. Yes, and that continued right along through the whole job, as far as that is concerned?

A. Yes.

Q. And they were what you so-called Civil Service employees until March some time in 1943?

A. Yes, sir.

Q. Yes, and they are all reported, I take it, on this pay roll of Lytle and Green?

A. Pardon?

Q. The wages of all those men were reported on this pay roll of Lytle and Green?

A. They were all reported on that pay roll, yes.

Q. Are you acquainted with these symbols?

A. Most of them, yes.

(Testimony of C. G. Polk.)

Q. All right. What is the——

Mr. Peterson: May I be permitted to stand by the witness?

The Court: Yes, for the purpose of pointing out.

Mr. Peterson: Thank you.

Q. Looking over on the first column to the left, what does two four mean?

A. Frankly I do not know.

Q. All right, then, the next is the name of the workman?

A. The name of the workman. [176]

Q. And then, what is this, please?

A. That is title.

Q. That is title?

A. Given a certain number, that indicates different jobs.

Q. Shovel runner or pick and shovel?

The Court: Right there I would like to ask, do those titles indicate whether they were a part of the organization of Lytle and Green or any of the unit contractors, or whether they were those Civil Service employees?

A. No, they do not indicate that.

Q. There is no way on that exhibit to distinguish between the two groups of employees?

A. Well, they are all Civil Service, every one of them.

The Court: You testified a couple of times there was somewhere around two hundred or two hundred and fifty people there that were part of the Lytle and Green organization?

(Testimony of C. G. Polk.)

A. Well, they were Civil Service.

The Court: They were the same as the workmen? A. Yes.

Q. Now, and going over to the column Service, "U.N.C.?"

A. That refers to unclassified service.

Q. Oh, that is unclassified service. Then the next column, what is this? A. Symbol.

Q. Symbols?

A. "7" indicates that he is on the hourly wage. I believe "4" indicates on a monthly wage.

Q. And then the rate, of course, that is self-explanatory. [177] This is correct?

A. That is time units, those are all hours.

Q. Those are hours. And then the gross pay, that is? A. Deductions.

Q. Deductions, those are—we are not much concerned about that. And then the net pay. Now, there is something over here on the right?

A. Well, I think I can explain to you this, the first one is Section.

Mr. Sager: I don't hear too clearly.

Q. Over on the right-hand column, there is a figure "6"—what does that indicate?

A. That refers to the month that the man was appointed.

Q. Oh, and that is when his pay begun?

A. Well, that month, it does not show the date, it just shows he was appointed in June, 1942.

Q. That shows he went to work in June. Does that show he got on the pay roll in June?

(Testimony of C. G. Polk.)

A. Yes.

Q. And what is one—what are those other—

A. The one eight refers to our district numbers. We have various districts throughout the United States, numbered from 1 to 18.

Q. What does one eight mean?

A. District 18.

Q. Where is that? A. Alaska Highway.

Q. Well, that pertained just to the Alaska Highway? A. Yes.

Q. If he did not start work with a pick and shovel? [178] A. No, but he was assigned.

Q. I understand you, but that character “NQ” indicates he was assigned to this Alaska job?

A. Yes, sir.

Q. Now, what are the other “six, oh, oh”—well, I will let you decipher that.

A. Well, the “6” indicates the type of work he was on, whether it was construction or surveys or maintenance. It is just another symbol. “6” is the symbol for construction.

Q. What do the ciphers mean?

A. Well, the next four refer to the contract.

Q. “Oh, oh, oh, two?”

A. Three “oh’s” and a “two” refer—

Q. What contract does that refer to?

A. Lytle and Green.

Q. That refers to this contract that is in evidence, is that correct?

A. Yes, and the next one you will notice is “oh, oh, two, oh. oh.”

(Testimony of C. G. Polk.)

Q. Wait a minute, pardon, there is "four, nine" over at the end, what does that mean?

A. Well, that is the state. They have assumed the state number of Alaska is number 49.

Q. Now, you are not able, I take it, you are able from the Exhibit 10 and the symbols on it to state that this work was done under the Lytle and Green contract, Exhibit 6 that you have seen, Defendants' Exhibit 6, is that correct?

A. Yes, sir, I can identify these. [179]

Q. Yes, you can identify that, but I don't suppose to be perfectly fair with you, Mr. Polk, you are able to tell us what part of that pay was drawn for services performed in Alaska or elsewhere?

A. I think I could.

Q. You think you could?

A. It would be an awful long tedious job, though.

Q. Well, I don't like to impose any hardship on you, but obviously the amount of that, I think it is computed there on the bottom, the amount in dollars and cents of pay roll, is it?

A. Yes, there is a penciled total here.

Q. Yes, what is that, please, will you read it to us? A. \$309,821.42.

Q. Assume that is the correct total, I don't know that it is. I did not add it, but let's assume it is correct, and that if you will turn the pay roll over and look on the front sheet you will see to July 15th? A. Yes.

(Testimony of C. G. Polk.)

Q. Yes, and you begun work on July 7th, moving earth up there in Alaska some place?

A. Yes.

Q. Yes, it is quite obvious then that a large part of that pay roll was pay roll of workmen starting down here in the United States, and so forth and so on? A. Yes.

Q. Yes, and you don't know, as far as pay roll is concerned, it shows that it was under this contract, but it don't show what amount was incurred subsequent to July 7th? A. Oh, no. [180]

Q. July 7th to July 15th? A. No.

Q. No. Now, about what was the monthly pay roll up there, do you recall, approximately?

A. About half a million a month.

Q. About \$500,000.00 a month. That would be \$125,000.00 a week, roughly? A. Yes.

Q. Now, just estimating—now I am not going to try and tie you down to anything—

Mr. Sager: I don't think this is material. I see what the purpose is, they are now attempting to show they are entitled to a premium on the basis of the clause which provides that where a pay roll is not supplied, they get fifty per cent of the whole cost of the contract.

Mr. Peterson: You are entirely mistaken about that.

The Court: I shall overrule the objection and allow him to answer, because the very nature of your defense is, Mr. Sager, if either of them are sustained, of course it overthrows the account

(Testimony of C. G. Polk.)

stated, and makes a recovery based upon the amount actually shown to be due if any.

Mr. Sager: Well, but this does not go to develop that.

The Court: I take it the question goes to the issue as to how many of these people on this pay roll actually performed services on the job, and others performed—others have time credited to them from the date [181] that they were notified they were employed and left the place of recruitment for service in Alaska. which the Court would judicially notice if the period of time were substantial.

Objection will be overruled.

Mr. Sager: Allow an exception.

Q. Taking into consideration what the operation was up there, and what you know about it, the cost per week, per day, per month, what portion of the pay roll of \$309,000.00 we will call it, a pay roll that you have before you, assuming the figure is correct, would you say accrued between—accrued between or was contracted, maybe that is the better word, between July 7th and July 16th?

Mr. Sager: If Your Honor please, I would like to suggest this. I have got the entire certified pay rolls for this whole period here, segregated here as to contractors. Now, I did not offer them in evidence because Mr. Peterson has been objecting to cluttering up the record, but if you want the actual figures on the pay rolls here segregated as——

(Testimony of C. G. Polk.)

The Court: Mr. Peterson, why do you take those dates July 7th and July 16th?

Mr. Peterson: Your Honor, I take those dates because under the policy it is provided that the premium shall be paid on the pay roll on all operations performed at, from, or in connection with the construction of approximately 155 miles of Alaska highway from Slana, Alaska, to the Canadian line.

Now, obviously, if there was \$200,000.00 of [182] pay roll expended here in getting men and recruiting men, and getting them on the job, there would be, if Your Honor should take the position, which I do not think you can under the law, that it only applied to this 155 miles, then Iowa and then any place outside of Alaska is elsewhere, and if there is \$200,000.00 of pay roll in moving men up there, then that would clearly come within the terms of the policy, just as much as this 155 miles.

Now, the witness says that there wasn't any dirt turned in Alaska until July 7th, so that this pay roll of \$300,000.00 which was down to July 15th, a large part of it must have been incurred outside of Alaska in connection with this project.

The Court: He may answer.

A. The question is the percentage?

Q. Yes.

A. From July 7th to July 15th inclusive?

Q. July 7th to July 15th inclusive. I don't know whether that would include July 7th, but July 7th to July 15th inclusive.

A. I would estimate about 25 per cent.



(Testimony of C. G. Polk.)

Q. Well, in dollars, express it, will you please?

A. \$140,000.00.

Q. \$140,000.00.

The Court: That is \$140,000.00 of that pay roll is for work that was actually performed on the job?

A. In Alaska.

The Court: In Alaska. [183]

A. But not on the—necessarily on the contract. It was on Section A-3.

Mr. Peterson: I think I can clear that up, Your Honor. I understand of the \$309,000.00 you consider that a hundred and—you consider that all of the \$140,000.00 excepting—or all of the \$309,000.00 excepting the \$140,000.00 were incurred getting the men up to the job and getting them on the job?

A. Yes, that is my estimate.

Q. That would make about \$160,000.00, something like that, or a hundred and seventy?

A. Yes, sir.

Q. Yes. Now. Mr. Polk, it is assumed—I am going to ask you to assume that the pay roll under this contract of Lytle and Green and these various unit price contractors between July 16th, 1942—no, strike this out.

From July 16th, 1942 to July 31st, 1942, was two hundred and fifty thousand, eight forty-two, ninety-four, and of those dates now, July 16th, 1942, to July 31st, '42, are you able to tell us,—have you any means of telling us what portion of that was for pay roll actually in Alaska and for the pay roll—for the compensation of employees who were outside

(Testimony of C. G. Polk.)

of Alaska engaged in moving equipment, material, and so forth, in connection with the performance of this contract?

A. I would say that 99½ per cent represents pay roll of the men actually in Alaska.

Q. Have you any means of verifying that?

Mr. Sager: You asked him for an estimate.

Mr. Peterson: All right, I am examining the [184] witness, if you please.

Mr. Sager: How are you going to verify an estimate?

A. That pay roll is made out in Alaska, and audited by our auditors, and certified to by myself.

Q. Yes.

A. And I am rather familiar with them—with all Alaska employees. They were all in Alaska, with the exception of probably a few that were enroute at that time, but there were very few.

Q. Well, Lytle and Green had some men down here in Seattle didn't they?

A. They were not on that pay roll.

Q. Weren't they, these men that were engaged in loading material out of here, and supplies? I thought you said that all of Lytle and Green's outfit with the exception of two were these so-called Civil Service employees?

A. In Alaska, that is true.

Q. That was true in Alaska? A. Yes.

Q. What was it down here, you don't know?

A. No, I have no means of knowing.

(Testimony of C. G. Polk.)

Q. But, they were included in the pay rolls that they were Civil Service employees?

A. Well, they were not included in that pay roll that you are quoting from there.

Q. Well, I have not seen this pay roll, and I don't suppose you have?

A. Yes, I have seen it. I have seen the original.

[185]

Q. Well, all right then, we will take up the next period from August 1st to August 15th, 1942. Assume the pay roll to all parties concerned to have been two hundred and fifty thousand, eight forty-two, ninety-four, will you tell us what part of that was earned—was paid to employees outside of Alaska?

A. It would be practically negligible, less than one per cent.

Q. And that you say is true with respect to all of the pay rolls, is that correct?

A. All of those major ones, in round numbers over a quarter of a million, that is true, of a quarter of a million, that is true.

Q. Yes. Mr. Polk, I wonder if you will be good enough to—if you have the matter available here, to tell us what the pay roll was for the 31st of July, 1942?

Mr. Peterson: The reason, Your Honor, I am asking that, is because the binder covers all activities, whether in Alaska or whether on this 155 miles, or any place, and it was superseded by a

(Testimony of C. G. Polk.)

policy on July 30th, so this one day may become important.

Mr. Sager: I object to that because the binder, of course, is no longer a contract. The contract that was issued on July 30th is dated back to June 17th, and becomes effective as of that date, and that is the contract that is sued on here.

Mr. Peterson: It was a contract until it was superseded.

Mr. Sager: It was superseded and incorporated into the present insurance contract. There is no liability [186] under the binder.

The Court: Of course, the policy of insurance provides that all operations performed after or in connection with the construction of approximately 155 miles of highway, and of course it depends upon what you gather in the way of thought from the language, "All operations performed in connection with the construction of the highway," and I assume the binder had similar language in it.

Mr. Sager: He proposes to show something now becoming broader.

Mr. Peterson: The binder contains the same language, but it is a little broader in its terms. Well, I won't ask you to do that if counsel thinks it is too much of a job for you.

Mr. Sager: I do not object because I think it is too much of a job. I object because there is no liability here, or any premiums under the binder—any premiums that are due under the insurance contract, not the binder.

(Testimony of C. G. Polk.)

The Court: I think that is correct.

Q. Now, Mr. Polk, the job outlined originally was 155 miles from the Canadian border to Slana, Alaska, is that correct? A. Yes.

Q. And when you went up there, you put in equipment at other places? A. Yes.

Q. Yes, and was that equipment—what is the reason you started in some other place other than on this 155 miles? [187] A. Pardon?

Q. What is the reason you started in some other place than this 155 miles?

A. Well, there was various reasons that entered into it; the army was the principal reason. They desired a road into Fairbanks rather than into Anchorage. At that time the original contract contemplated a road that connected with Anchorage.

Q. And where did you start work on July 7th?

A. Well, that particular operation was at Gulkana.

Q. Where is that with reference to Slana?

A. Sixty-three miles westerly.

Q. Westerly, and how long—then, where did your other operations continue?

A. On July 13th we started the—what is known as the Big Delta Junction.

Q. Where is that with reference to Slana?

A. Well, that would be 140 miles north of this other operation that started on July 7th.

Q. At Gulkana? A. Yes.

Q. I want to call your—

(Testimony of C. G. Polk.)

Mr. Peterson: I am through with the witness——

Q. Now, the contracting officer up there under this contract was the government, is that correct?

A. Pardon?

Q. The contracting officer under this contract was the government—was designated as the contracting officer, that was the Federal Works Agency, whatever it was?

A. Yes, or the head of it. [188]

Mr. Peterson: In that connection, Your Honor, I want to call the Court's attention particularly to Section 4 of paragraph—or paragraph 4 on page 5 of the contract, providing that work may be done—in providing that work may be done in any other section.

The Court: What paragraph is it now?

Mr. Peterson: That is paragraph 4 of page 5. Does that read—these copies are somewhat different.

The Court: This paragraph 2 apparently on page 5, "The contracting officer or his authorized representative"——

Mr. Peterson: Yes, I meant paragraph 4.

The Court: It is numbered 4, but it is the second paragraph on page 5.

Mr. Peterson: Yes. That is all.

### Redirect Examination

By Mr. Sager:

Q. Mr. Polk, you referred to this Plaintiff's Exhibit 10, this pay roll purporting to be from the period——

(Testimony of C. G. Polk.)

Mr. Sager: Does this show the period of coverage, Mr. Peterson?

Mr. Peterson: Well, I am assuming that it does. It is marked at the top there you will notice, July 15th.

Mr. Sager: To July 15th?

Mr. Peterson: To July 15th—just a moment, and that ties in with the report they made to us, the first one they made to us. [189]

Q. Does this represent a pay roll of any one—I am referring to Exhibit 10—to any other than Civil Service employees? A. No.

Q. Now, you have referred to Lytle and Green organization and the other unit contractors' organizations. In referring to organizations or contractors, are you referring to the entire organization under the supervision of that contract, or only to the men who were not under Civil Service?

A. I don't believe I understand the question.

Mr. Sager: That is a difficult question, strike it.

Q. When you refer to the Lytle and Green organization, you mean just the Lytle and Green contract, or do you mean the entire group of men working up there under their direction?

A. Well, ordinarily I would refer to it as the entire organization.

Q. Did that include the Civil Service employees?

A. Yes, it would.

Q. Well, now, how many men did Lytle and Green have within its own organization in Alaska that were not Civil Service appointees?

(Testimony of C. G. Polk.)

A. I believe there were three, of which one left shortly after he came up.

Q. Of course, I will confine that also from the period of June 17th to August 30th.

A. The answer is the same.

Q. And all of this personnel they had up there, they were [190] working in the office, or wherever they were, outside of those three men were Civil Service appointees? A. Yes, sir.

Q. Under the same provisions that have been related? A. Yes.

Q. How many engineers did Lytle and Green have in Alaska during this two and a half months' period?

A. On their own construction activities they had but one.

Q. That is on this contract? A. Yes.

Q. Now, you stated that the work started up there on July 7th—that is, the actual construction. Were the organizations there in Alaska at that time?

A. Yes, they were all in Alaska at that time. Certainly no later than a day or two after that. I don't remember exactly, but there might have been up to July 9th, but all of them got there.

Q. And was there any substantial number of men coming in afterwards? A. No.

Q. Now, between July 7th and August 1st, where did—where were the organizations working?

Mr. Peterson: I think that has all been covered in direct examination, Your Honor.



(Testimony of C. G. Polk.)

The Court: He may answer.

A. At Gulkana and on Section A-3, the Big Delta Junction on Section A-4, and some men were loaned to the Alaska Road Commission for work on the Richardson Highway, a number of others were employed in Valdez, in unloading a boat, a number of others were engaged in camp construction. [191]

Q. Was this camp construction on Sections 1 and 2?

A. No; no, the camp construction was at the central headquarters at Gulkana, and mainly—although two or three were being built on this Section A-3, from Gulkana to Slana.

Mr. Sager: Referring to that same Exhibit, Plaintiff's Exhibit 10, I would like to approach the witness if I may.

The Court: Yes.

Q. Mr. Peterson asked you about these symbols back here which indicate the particular unit contractor that the man was working under. Does that symbol show for each man on the whole list?

A. Yes, sir.

Q. And does it show the various other unit contractors?

A. Yes.

Q. In other words, it shows whether he was a part of Lytle and Green organization or some other unit organization?

A. Yes.

Q. And do you know what these deductions on here are for?

A. Yes.

Q. What?

A. Board and lodging.

(Testimony of C. G. Polk.)

Q. Was there anything else included in the deduction?      A. No.

The Court: Let me interrupt you here, Mr. Sager, just a moment. Why would these men be working on these other projects that you have just mentioned, if they were recruited for this particular work? [192]

A. Well, the primary reason is the entrance of the Japanese into the Aleutian Islands made the army decide that they had better concentrate on a road into Fairbanks, rather than into Anchorage, so they requested that we give priority construction to this so-called Section A-4.

The Court: And then the work that they did do on Section A-4, was not at all directly a part of Section A-1 or A-2?

A. It was not, no.

The Court: Nor not in connection with A-1 or A-2?

A. Well, they connect with them.

The Court: I know the road ultimately, but it was not in connection with that construction?

A. No.

The Court: If it had not been for this emergent condition that arose, would these men have been on the A-1 and A-2 job?

A. Well, at that time?

The Court: What I am trying to get at is, were the Lytle and Green directed men, whether they call them Civil Service or employees through the month of July up until August the 1st when construction

(Testimony of C. G. Polk.)

work began on the highway here in question, or were they men who had been brought for this job but by reason of the emergency were diverted to another job?

A. Well, they were diverted to this other job for the reason I explained, and also because we could not get into this section A-2 at that time or [193] section A-1. The army had a regiment of engineers in there, and they completely blocked entrance to the section.

The Court: But, the men, whether they came as Civil Service employees or employees of these project managers, left their homes in the States, wherever they were, and came to Alaska for the purpose of undertaking work on these two sections of the highway that are mentioned in the contract here?

A. Well, I don't suppose the men themselves knew what section they were going on. Just the Alaska Highway is all they probably knew.

The Court: But, Lytle and Green and the other unit contractors were recruiting men only for these two pieces of highway, if I understand the testimony correctly, insofar as they assisted in any recruiting work?

A. I suppose so.

The Court: Well, as the engineer representing the Public Roads Administration, didn't you know and didn't you testify they had no other contracts for construction at that time?

A. Yes, that is true.

(Testimony of C. G. Polk.)

The Court: I think that is all, Mr. Sager. I wanted to clear that up.

Mr. Sager: I want to ask a question which is probably not proper redirect. It should have been asked on direct examination.

Q. Mr. Polk, when there were any promotions or changes in the status or classification of these men, did you have [194] anything to do with that?

A. Yes, sir.

Q. Well, how did that come about, just explain it to us, the procedure by which that would be—

A. Ordinarily the management contractor sends to us a form for either discharge or promotion, which we acted on, either approved it or disapproved it, whichever was—seemed to be best for us.

Q. Did you actually disapprove any of those?

A. Oh, yes, that is, as far as promotions were concerned. I don't recall of ever disapproving any requests for terminations.

Q. You did disapprove requests for promotions or change in classifications?

A. Oh, yes, we investigated the case in nearly every instance.

Q. Now, when this equipment was repaired, did I understand it was repaired by the unit contractors or the Lytle and Green?

A. During this period from June to August, it was done entirely by the unit contractors and their men assigned to that—the Civil Service men assigned to them.

(Testimony of C. G. Polk.)

Q. That is the men who did the repair were under Civil Service?      A. Yes.

Q. From August 1st to August 31st, how many organizations were employed on Sections A-1 and A-2, or this 155 miles?      A. Two.

Q. And they were who?

A. E. M. Dusenberg and Weldon Brothers.

[195]

Q. Were there any others on that section at that time?      A. No.

Q. These two contractors, Dusenberg and Weldon Brothers were the only ones on the 155 miles during the period from June 17th to August 31st, is that correct?      A. Yes, sir.

#### Recross Examination

By Mr. Peterson:

Q. Mr. Polk, you say some of these men, we will say, went over to the Richardson Highway, that is your testimony?

A. We loaned some to the Alaska Road Commission, yes.

Q. Did the unit move over?

A. Well, you see, Gulkana, their hearquarters is right on the Richardson Highway, and it is in that vicinity that the work was done. They did not move them. They were already there.

Q. They did not move, but how was it done, did you assign a unit contractor to go on the Richardson Highway with his outfit?

A. No, as I recall it was taken up as a matter

(Testimony of C. G. Polk.)

of conference between the Alaska Road Commission and the Lytle engineer, and Mr. Falkendahl and myself, and we agreed to loan him some men for the period. We had very little activity. We kept them on our pay roll and later billed them on a transfer voucher.

Q. Well, when they went over there did you send three or four men to work under a boss of it, or did you send a foreman with a number of men? How was that done?

A. As I recall, it was mostly mechanics and a few bulldozer [196] operators, but I don't recall of any foremen being in there.

Q. You don't remember when that was done?

A. I don't believe the Road Commission wanted foremen. They had their own foremen.

Q. You don't remember when that was done, then? A. Yes, it was in July.

Q. But, you kept them on your—they were kept on Lytle and Green's pay roll? A. Yes.

Q. Now, you referred to this matter of discharge of men, and I understand the unit contractor would discharge a man and he would come to you and make up some kind of a slip or paper?

A. It would pass through the management contractor before it came to us.

Q. Oh, it went to him? A. Yes, sir.

Q. And then he approved it and then you okehed it? A. That is true.

(Testimony of C. G. Poll.)

Q. Yes, and were there many men discharged there?      A. No, not very many.

Q. And then you sent your report down to the Seattle office?      A. Pardon?

Q. You sent your report then down to the Seattle office?

A. We sent the necessary papers so they could terminate the appointments.

Q. Down to the Seattle office?

A. To the Seattle office.

Q. What became of the man, did he wait around there until it [197] was approved by the man in Seattle?

A. No, we got him out as fast as we could.

Q. He pulled out?      A. Yes, sir.

Q. Now, when they hired a man up there, supposing he was a local resident, when they hired a man, who hired him? For instance, if Duesenberg wanted a man, who hired him?

A. Well, again that came through the management contractors to our office.

Q. Well, I mean who went to him and said, "Smith, do you want to go to work here on the pick-and-shovel?" Who contacted the man?

Mr. Sager: I submit he is not qualified to answer. He was not there.

The Court: If he was there, we don't know.

Q. Who actually hired the men and employed them?

A. I can answer that in a few instances of that, because they were always referred to our office first before any paper work was made out.

(Testimony of C. G. Polk.)

Q. Well, who contacted the man first?

A. The contractor.

Q. The contractor, and——

A.. It might have been the management contractor, though.

Q. Well, whoever it was, and then he got your okeh on it?      A. Yes.

Q. Got your approval on it?      A. Yes, sir.

Q. And then you put the man to work?

A. Prior to hiring him.

Q. Beg pardon? [198]

A. Prior to hiring him he got our approval.

Q. I understand he got your approval, and then you put him to work??

The Court: The point is, where, if the evidence would be relevant and have any value at all, did you require him to take the oath and meet all of the other requirements—fulfill the Civil Service classification.      A. Yes, sir.

Q. After you had him in the Civil Service proposition, the Civil Service scheme was abandoned, wasn't it?

A. Well, it was abandoned the following year.

Q. All right, then what did you require him to do?      A. The following year?

Q. Yes.

A. Oh, I see. The following year the contractor and the employee had an agreement between them. This paper is—for hire agreement, is a printed sheet setting out all the terms of the employment, and



(Testimony of C. G. Polk.)

to that is attached what is called an assignment of service form, which papssed on to the various organizations of the Public Roads Administration, and before the man could be placed on the pay roll that assignment to service form had to be approved by some one in charge of the work, for the Public Roads——

Q. I understand that before a man could go to work he had to have the approval of yourself or some of your subordinates in connection with the job, that is correct?           A. Yes.

Q. And that was the same before, when you had the Civil ([199] Service business, except he had to sign up all these blanks, is that right?

A. Well, of course we had nothing to do with the hiring of these men in 1942. The contractor did that all himself.

Q. You did not hire any men down here in 1942, did you?

A. As far as I know, they hired them all.

Q. When were these men recruited in Iowa and Nebraska and that area, when were they recruited, in what month in 1942?

A. In '42 I would say they were recruited in May and June.

Q. Where were you in June?

A. I was in Alaska.

Q. Yes, and you did not contact any of these men?           A. No, I did not.

Q. No, and you did not order any particular individual recruited, did you, or your organization?

(Testimony of C. G. Polk.)

A. Not in the United States, I did not. We ordered a few from Alaska.

Q. Well, those were just occasional?

A. That is right, just a few.

Q. And on these promotions, promotions usually involved an increase in pay, I take it?

A. Yes.

Q. And those matters would come up to your organization and you would approve or disapprove?

A. Yes.

Q. Yes, it was really a cost plus government job, the government was making the pay rolls?

A. Yes.

Q. Yes. Do you know how this Civil Service business came [200] about to begin with?

A. No, I am not qualified to say that.

Q. You don't know?? A. No.

The Court: Let me ask you there, Mr. Peterson, were these men in organized labor unions at any time they were on these jobs? A. No.

The Court: Even when they went over into private recruitment in '43? A. No.

Mr. Peterson: There aren't any labor unions, or there were not any up in that section of Alaska?

A. Not to my knowledge.

Mr. Peterson: I think that is all. Thank you.

#### Redirect Examination

By Mr. Sager:

Q. This hire agreement that you mentioned, Mr. Polk, was that a government form or government blank?

(Testimony of C. G. Polk.)

A. No, that was prepared for the management contractor.

Mr. Sager: I think that is all.

Mr. Patterson: That is all.

(Witness excused.)

Mr. Sager: Pardon me just a moment. I think I am going to offer at this time certified copies of the pay roll of Duesenberg, Inc., and Weldon Brothers. [201] I started to do that once before and withdrew them because of the stipulation, but in view of the testimony that—the testimony that no work was commenced on these two sections of the road until August, and this pay roll covers a greater period or a period earlier than August, I think I will introduce it to show the amount credited for the period of from August on?

The Court: And the pay roll that you are now offering, covers the period in July?

Mr. Sager: Well, it covers the whole period, apparently.

Mr. Peterson: I understand this pay roll on the 155 miles——

Mr. Sager: This is the pay roll on everything during the time they were there.

Mr. Peterson: This is the matter regarding which we stipulated this morning. I don't like to encumber the record.

Mr. Sager: I will explain. My only purpose at the time we stipulated this morning, we stipulated the entire pay roll of these two contractors.

The Court: You stipulated that one of them had

a pay roll of a hundred and two thousand three hundred and some dollars and the other pay roll of seventy-one thousand and some dollars.

Mr. Sager: That is correct. These are the two contractors he testified worked on sections 1 and 2 during this period, and the only portion of that period they worked on the sections 1 and 2 was from August 1st until August 30th. Now, the totals we stipulated this [202] morning cover the greater period of that. That is the only period I want to correct, they gave a period in the case of Duesenberg from July 1st to August 31st, and in the case of Weldon Brothers from July 16th to August 31st.

The Court: And do they disclose where Dusen-berg worked during July, where the men with him worked?

Mr. Sager: Do they show that, Mr. Polk, do all these pay rolls of Dusen-berg and Weldon Brothers show where the men were working in the sections during July?

Mr. Polk: No, they will not.

The Court: I don't see they would be any aid, if added to the stipulation.

Mr. Sager: Because, if they were not working on these sections of the road before August 1st, and we stipulated for July——

The Court: You have not stipulated for July. You stipulated for August.

Mr. Sager: The figures I gave you covered the whole period.

The Court: \$102,000.00?

Mr. Sager: Yes, from——

The Court: Well, I got this witness' testimony,

I have got it under his testimony that there was \$102,384.00 work done by Dusenbergs on this contract in August, A-1 and A-2, and Weldon Brothers, \$71,357.00.

Mr. Sager: I think that was our stipulation, rather than testimony.

The Court: Well, the question was asked here [203] just this afternoon, either by the Court or one of counsel.

Mr. Sager: Well——

The Court: Now, if it is other than that, I want to get it clear.

Mr. Sager: That is the point. Take the stand again, Mr. Polk.

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C. G. POLK

resumed the stand, was examined further and testified as follows:

Mr. Sager: Perhaps I can show these to Your Honor and you can get the point I am driving at. These little slips I have attached to them, are Mr. Polk's computation from the file, showing the date and the amount taken from the pay roll for each period.

The Court: Well, then, these little slips indicate that the work done from July 1st to July 15th, twenty-three thousand some odd dollars, was done elsewhere than on this job. Are these your figures?

A. Those penciled figures are mine, yes, sir.

The Court: Well, there is a date fixed there in July?

A. Those dates refer to the pay roll period.

(Testimony of C. G. Polk.)

Redirect Examination

By Mr. Sager:

Q. The Court now wants to know whether in July that figure indicates that the work was done in Sections 1 and 2?

A. It couldn't have been done on Sections 1 and 2, because [204] they did not enter that work until August 1st.

Mr. Sager: That is the point I am trying to establish, that the only part of those pay rolls attributable to those pay rolls is from August 1st on.

The Court: Well, according to your calculation, in order that the Court can get this matter clear in mind, what was the work done on this contract or these pieces of highway which these two contractors that you say were the only two that did any work on the actual construction——

Mr. Sager: The amount, Your Honor, please?

The Court: Yes.

Q. Can you tell that from those figures, Mr. Polk?

A. It will be the sum shown after August 1st on those penciled slips.

Q. Would you read and get those, and read what they are?

A. Weldon Brothers, the period of 8-1—August 1st, to August 15th, the pay roll of \$18,562.22.

The period August 16th to August 31st, the sum of \$19,145.88.

The Court: What was the first period, eighteen thousand what?

(Testimony of C. G. Polk.)

A. Five hundred and sixty-two dollars and twenty-two cents, and in addition there are two small supplemental pay rolls, shown one from August 1st to August 31st, \$155.47. Another one covering August 1st to September 30th, in the sum of \$86.00, and that is the total amount covered by these pay rolls.

Q. That is Weldon's?

A. On Weldon's, on Sections A-1 and A-2 during that period. [205]

The Court: There are approximately \$37,862.00, that is only an approximation?

A. Yes. On E. M. Dusenbergs, the pay roll, August 1st to August 15th, amounted to \$26,094.23. From the period August 16th to August 31st, there is a pay roll of \$12,873.63.

Mr. Peterson: Twelve eight—

A. Twelve eight seventy-three and sixty-three cents, during that same period, August 16th to August 31st.

There is another pay roll amounting to \$13,055.31, and we have shown small adjustment pay roll, from August 1st to August 31st of \$81.07. And that is the total amount of pay roll that Dusenbergs incurred prior to August 31st, on Sections A-1 and A-2.

The Court: If my figures are correctly—approximately fifty-one thousand?

A. Approximately fifty-one thousand.

The Court: That is all.

(Testimony of C. G. Polk.)

Mr. Sager: With that explanation, then, I withdraw the offer.

(Witness excused.)

Mr. Sager: The defendants rest.

Mr. Peterson: I would like to ask the witness a question. You don't need to go on the stand, and it doesn't need to be in the record, if I may.

I want to ask Mr. Polk to be prepared in the morning to give us the estimated amount of the various [206] unit contractors, if he can conveniently. Will you do that, please?

Mr. Polk: Yes, sir.

The Court: Yesterday morning there was some statement made by certain documents and other entries made, to be made in connection with submission of interrogatories.

Mr. Sager: They have not come yet, Your Honor. I hardly anticipate them yet. They were to be mailed the day we started here in Sioux City.

The Court: Mr. Peterson, how much time will your rebuttal take?

Mr. Peterson: Well, I could finish this afternoon, Your Honor. I may not.

The Court: It was in response to your own interrogatories that you submitted, that you asked for certain documentary evidence, and they are not here yet and I just wondered if you wanted to have them to use in your rebuttal?

Mr. Peterson: Your Honor, I would want to look at the interrogatories and the documents,—



look at the paper or at the list before I want to answer that question. It may be that I will waive those and close the plaintiff's case, but I wish to look at them first, and what is the condition of Your Honor's calendar for tomorrow?

The Court: I think we have—we can proceed with this case, unless we have naturalization in the afternoon. We might be compelled to adjourn early. We will have to finish by the morning. It is open. [207]

Mr. Peterson: I think I will be able to let Your Honor know before the Court convenes tomorrow, and Mr. Sager.

Mr. Sager: Do you propose to go further yet this afternoon, Your Honor?

The Court: No, since we have to go over, I think that—I think maybe we will adjourn over until 10:00 o'clock.

Mr. Peterson: May I inquire of the witness who is in the navy as to his position?

Your Honor, Mr. Miller, whose testimony will be very short, is in the Merchant Marine, and he advised me his duties in the service prevent him—he will be here in the morning. I wonder if I can put him on. He will be short about it.

The Court: Yes.

L. C. MILLER,

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. State your name, please.

A. L. C. Miller.

Q. Mr. Miller, what was your occupation in April and May of 1942?

A. I was special agent for Hansen & Rowland.

Q. You are now in the United States Navy, or Merchant Marine? [208]

A. Maritime Service.

Q. Do you know Mr. Harvey Rice, of C. F. Lytle Company?      A. Yes, I do.

Q. I will ask you whether or not you contacted C. F. Lytle, the defendant, C. F. Lytle Company and Green Construction Company in connection with this insurance coverage on this Alaska contract?      A. Yes, sir.

Q. Where did you contact them at?

A. Sioux City, Iowa, and Des Moines, Iowa.

Q. Who did you discuss the matter with?

A. Mr. Harvey Rice and the officiating manager of the Green Construction Company was not in Des Moines, but I talked to the man in charge when I was there. I don't recall his name.

Q. Now, I will ask you whether or not Mr. Rice informed you or anybody of the Lytle Company as to the extent and magnitude of this job?

A. Yes, we did discuss it.

(Testimony of L. C. Miller.)

Q. Yes, and state whether or not Mr. Rice made known to you the—well, just a minute—strike that out.

Who was giving attention to this insurance matter on behalf of the defendants Lytle and Company and the Green Company? A. Mr. Rice.

Q. Yes. Did Mr. Rice—ask you whether or not he made known to you their requirements with respect to insurance in connection with this matter?

A. Yes, he did.

Q. And ask you also whether or not he made any statements [209] and representations to you if any with respect to the extent of the pay roll that was expected to be covered here? A. Yes.

Q. What did he tell you in that connection?

Mr. Sager: I object to that, Your Honor. I do not see its materiality.

The Court: Objection will be overruled. Rice is a representative of the defendant corporation, and a conversation had with him——

Mr. Sager: The extent—the anticipated pay roll—the pay roll is in here. What he said he thought it would be——

The Court: He may answer.

Mr. Sager: Exception.

A. He estimated the pay roll to be approximately seven to seven and a half million dollars on the entire project.

Q. I will ask you whether or not that estimate was given to you in determining—in connection with estimating what the premium would be?

(Testimony of L. C. Miller.)

A. It was.

Q. Yes, and you were familiar with this policy after it was issued?      A. Yes, sir.

Q. I will ask you whether or not the policy conforms to his request in the matter?

A. Yes, it did.

Q. I ask you in connection with your discussions there, was the coverage of these unit men—unit contractors also discussed? [210]

A. Yes.

Q. Was there anything said to you about Civil Service then?      A. Nothing.

Mr. Peterson: Cross examine.

#### Cross Examination

By Mr. Sager:

Q. When was this conversation with Mr. Rice?

A. Approximately the latter part—

Mr. Peterson: Just a minute, there is another matter, pardon me.

#### Direct Examination—(Resumed)

By Mr. Peterson:

Q. How long were you around Sioux City, Iowa?

A. I was in that neighborhood approximately three weeks, I believe.

Q. Yes, and I ask you of your own knowledge, do you know how these men were recruited there, or part of them at least?

A. I saw a little indication of that recruiting program in Sioux City.—in Des Moines when I

(Testimony of L. C. Miller.)

called there. I spent some time in the office waiting for the manager, and waiting for him.

Q. In what office?

A. In the office of the Green Construction Company. They had a large room where they were interviewing men for the Alaska road job.

Q. You say "they," who were "they?"

A. The Green Construction Company. [211]

Q. Well, who were the individuals, were they government men or men known to you to be employed in the construction company?

A. That I cannot say. I did not talk to the people who were interviewing the men. I talked to one of the men. He said he had been hired that day, and was on his way to Alaska.

Q. Don't tell us what somebody told you.

Mr. Peterson: That is all.

### Cross Examination

By Mr. Sager:

Q. You don't know, of course, whether these men employed in recruiting had been appointed under Civil Service or not, do you?

A. I cannot say that, no.

Q. Were you interested in this contract of insurance at the time it was issued, or we will say, in June, did you know about it then? A. Yes.

Q. Did you know when the binder was issued?

A. I can't recall the exact date, but——

Q. Were you more or less familiar with the negotiations leading up to the issuance of the policy and the issuance of the——

(Testimony of L. C. Miller.)

A. Somewhat, yes.

Q. Do you know Mr. Northrup?

A. I met him once.

Q. When was that?

A. I believe the latter part of June. [212]

Q. Was that in connection with this policy?

A. No.

Q. Where was that?

A. In the Hungerford Hotel.

Q. Well, Mr. Rowland was there?

A. Yes, sir.

Q. And wasn't the Lytle and Green matter mentioned at that meeting?

A. We had met Mr. Northrup to discuss the Okes Construction Company.

Q. Was the Okes Construction Company policy then issued?

A. I don't recall that. I was in the Seattle office and the policy was issued in the Tacoma office.

Q. Why did you call upon Mr. Northrup to discuss the Okes Construction policy?

A. It was in the process of being written, I believe, at that time, and Mr. Northrup had the governmental supervision of that policy, was our estimation.

Q. The Okes Construction policy was a comprehensive policy on another cost plus contract with the government, is that right?

A. What was your question again?

Q. I say, you knew that the policy issued on

(Testimony of L. C. Miller.)

Okes Construction Company was a comprehensive—no, strike that. It was a comprehensive employees' compensation coverage policy?

A. The contract was being discussed at that time, and the contract was a——

Q. And the contract was a cost plus fixed fee contract, as Lytle and Green? [213]

A. That was my understanding.

Q. You knew and recognized Mr. Northrup was the government agent in charge of the supervision of this contract? A. Yes.

Q. Did you meet Mr. Northrup thereafter?

Mr. Peterson: I do not think all of this is cross-examination, but it certainly don't have anything to do with what I had inquired of.

The Court: You may answer.

A. I had dinner with Mr. Northrup one night after that, I believe.

Q. Did you discuss the Lytle and Green matter then?

A. No, it was more or less of a social meeting, is all I recall.

Q. You knew of the government's interest in this insurance contract, did you not? A. Yes.

Q. You knew that it was subject to the approval of the Public Roads Administration, or the government agency? A. That is right.

Mr. Sager: I think that is all.

#### Redirect Examination

By Mr. Peterson:

Q. Did you ever talk to Mr. Bright?

(Testimony of L. C. Miller.)

A. I talked to Mr. Bright over the telephone only once.

Mr. Peterson: That is all.

(Witness excused.) [214]

The Court: Is there any contention here on the part of the plaintiff that the government did approve this insurance contract, or any contention on the part of the defendants that the government rejected or disapproved it?

There is no testimony either way as I recall.

Mr. Sager: The government's contention, that is one of the reasons why we showed this series of letters of course, from La Rocque to Northrup. It was never approved. They were negotiating throughout this period of time, trying to negotiate a settlement of the premium, but there never was an approval. I think it is important to call your Honor's attention to the fact that the policy was not actually issued until the end of July—July 30th, the first time these parties came in possession of the policy. The policy was not in existence for thirty days. As far as examining it or considering it while it was dated back to June 17th, they never knew what the policy was until some time after July 30th, when it was actually issued, and July 30th to August 31st, a period of one month they were negotiating—objecting, and all of this series of negotiations ensued thereafter.

Mr. Peterson: I do not want to argue the matter now, but the evidence shows that on June 12th, if



my memory serves me correctly, the binders were delivered to Mr. Bright, who is district engineer at Seattle, and the binder contains all of the provisions of the policy, with possibly a slight additional provision regarding the territory. [215]

We propose to introduce Mr. Rowland in the morning, who——

The Court: Well, I just wanted to get it fixed in my own mind.

Mr. Peterson: Well, we will show, I think, three copies of the policy were delivered to Mr. Bright on July 30th and no objection made to them. I think it was three copies—or at least one copy, anyway.

Mr. Sager: As a matter of fact, the original.

Mr. Peterson: Well, I think it is in evidence already, that the original was delivered, Your Honor, on July 30th. If Your Honor will recall those letters——

The Court: Yes, I recall those.

Well, we will take an adjournment now until 10.00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock a.m., September 8th, 1944.) [216]

September 8, 1944,

10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

Mr. Sager: I advised the Court that these interrogatories and other mattres that were required came this morning. There is a copy of the interrogatories, and here is a letter produced for inspection. I will file a copy of the interrogatories.

Mr. Peterson: If the Court pleases, we have in this case a deposition——

The Court: Is that the deposition of D. W. Clayton?

Mr. Peterson: Yes, Your Honor. I think I should state to the Court this deposition was taken——Mr. Clayton was expecting to leave the jurisdiction of the court daily, and so far as I know he has not left yet. He is within the jurisdiction of the Court. Is there any objection under the circumstances in offering the deposition?

Mr. Sager: No, we do not object to it on that ground.

Mr. Peterson: Would you like to take the stand and read the answers, and I will read the questions, and then you can make your objections. You don't have a copy, do you?

Mr. Sager: No, I don't have a copy.

The Court: The original deposition is here, and [217] the record may show the Court directs publication of it.

Mr. Sager: There are, I think, Mr. Peterson, a couple of corrections of wording. I might call your

attention to them now, page 18, line 3, I think this should be "two".

Mr. Peterson: Your Honor, may we—the witness because of the situation, did not have a chance to read this deposition. We waived the signing of it, and obviously the word "true" on page 18, line 3, should be "two". May we——

The Court: Yes, if you both agree upon that.

Mr. Sager: Yes. Line 5 of page 24, the word "regrouped" should be "recruited".

The Court: What page?

Mr. Sager: Page 24.

The Court: And what line?

Mr. Sager: Line 5.

The Court: Oh, yes. Well, do you desire to read this deposition so as to get it into the record?

Mr. Peterson: Yes, Your Honor, it was under the stipulation taken subject to objections that could be raised at the time it is presented.

“United States District Court, Western District  
of Washington, Southern Division”

No. 556

“HANSEN & ROWLAND, INC., a corporation,  
Plaintiff,

vs.

[218]

“C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION CO., a cor-  
poration,

Defendants.

### “DEPOSITION OF D. W. CLAYTON

“Be It Remembered, That hertofore and on, to-  
wit: the 31st day of August, A.D., 1944, commenc-  
ing at the hour of 10:30 o'clock a.m., the deposition  
of D. W. Clayton, a witness produced in behalf of  
the plaintiff herein, was taken before me, H. C.  
Walker, a Notary Public in and for the State of  
Washington, residing at Tacoma, pursuant to stipu-  
lation herein, at Suite 625, Dexter-Horton Build-  
ing, Seattle, King County, Washington.

“The Plaintiff herein being represented by its at-  
torney and counsel, Charles T. Peterson, Esq.,

“The Defendants herein being represented by  
their attorney and counsel, Harry Sager, Esq.,

“Whereupon the following proceedings were had  
and done and testimony taken as follows. to-wit:

### “STIPULATION

“It is hereby stipulated and agreed between the  
plaintiff and defendants, by their respective coun-

sel, that the deposition of D. W. Clayton may be taken before H. C. Walker, Notary Public in and for the State of Washington, residing at Tacoma, on oral interrogatories commencing at the hour of 10:30 o'clock a.m., on the 31st day of August, A. D. 1944, at Suite 625, Dexter-Horton Building, Seattle, Washington; and it is further [219] stipulated and agreed that any and all objections, except objections to the form of questions propounded, may be raised and passed upon at the time of trial.

“D. W. CLAYTON,

a witness produced in behalf of the Plaintiff herein, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

“Direct Examination

“By Mr. Peterson:

“Q. State your name, please?

“A. D. W. Clayton.

“Q. Where do you reside, Mr. Clayton?

“A. Sioux City, Iowa.

“Q. Mr. Clayton, are you acquainted with the defendants, C. F. Lytle Company, incorporated, a corporation; and Green Construction Company, a corporation?

A. Yes, sir.

“Q. State whether or not you are associated with either of those companies?

“A. I am associated with both of them.

“Q. In what capacity?

“A. As office manager and office engineer, and in 1942 I was employed by the joint venture of

(Deposition of D. W. Clayton.)

Lytle and Green on the Alaska Highway as Assistant Project Manager.

“Q. Mr. Clayton, the primary contract appears to have been entered into on or about the 4th of May, 1942; I will ask you when the corporations of Lytle and Company and Green and Company became active in making preparations for the performance of this contract?

“A. Well, the negotiations were carried on during the month [220] of April, 1942, the latter part of the month, and approximately the date of the contract.

“Q. As office manager and engineer, did you participate in those negotiations?

“A. To an extent; I had charge of the development or assisted in the development of the organizations to do the construction work.

“Q. What had been the business of Lytle and Company during the period you were there prior to and at the time of making this contract?

“A. You mean on this joint venture?

“Q. No, in their past business?

“A. Lytle and Company for a number of years had been highway contractors, particularly grading and bridge work.

“Q. Operating in what area generally in the country?

“A. In Iowa, Missouri and Nebraska; I probably could say in the middle west and in Alaska.

“Q. How long had you been acquainted with Green Construction Company and its operations?

(Deposition of D. W. Clayton.)

“A. Ten to fifteen years.

“Q. What generally was its business?

“A. They are grading contractors.

“Q. As contracting outfits go, were they regarded as small or large operators?

“A. I would say medium.

“Q. Now, after the contract was made with the Federal Works Administrator on this Alaska Highway, what did the defendant companies proceed to do with respect to making preparations for the carrying out of the work? [221]

“A. Subject to the approval of the Public Roads Administration, they arranged for a number of unit contractors to take their organizations and equipment to Alaska and perform the actual construction operations on the highway.

“Q. Now, when did you become acquainted with these various other, I will call them sub-contractors?

“A. Excuse me, I think the better word is unit contractors.

“Q. Very well, I will call them unit contractors in accordance with your suggestion; did you become acquainted with those various unit contractors? A. Yes, sir.

“Q. What was the business of those generally?

“A. Some of them, the greater number were grading contractors and then there was a smaller number of what we call bridge contractors.

“Q. Were all of these individuals, partnerships or corporations, unit contractors, I will ask you

(Deposition of D. W. Clayton.)

whether or not they were all, prior to 1942, engaged in the general contracting business on a larger or smaller scale?           A. That is correct.

“Q. And there were some ten or twelve of those, were there not?           A. Yes, sir.

“Q. It is not important to name them. What, if anything, did your organization do about recruiting labor?

“A. Well, for our own organization, we set up the administrative personnel to cover the management and direction of the work, including the records required by the [222] Public Roads Administration and arranged for supplies and transportation of this equipment that was furnished by the government agency.

“Q. Now, did the Lytle Company and Green Company or either, furnish any quantity of equipment of their own?           A. No, sir.

“Q. How about the unit contractors, did they furnish any?

“A. The unit contractors furnished the major items of equipment.

“Q. And what did that generally consist of?

“A. For the grading contractors, tractors, scoops, bulldozers, trucks and repair parts.

“Q. Any shovels?

“A. Including shovels, track lines and cranes, including bridge builders' equipment, saws and tools.

“Q. All small tools?           A. Yes, sir.



(Deposition of D. W. Clayton.)

“Q. About where was that equipment assembled and shipped from?

“A. From Iowa and neighboring states in the middle west.

“Q. Without detailing the number of units I wonder if you could tell us right offhand how many were shipped by train?

“A. All of the equipment was assembled at the station nearest its location at that time and shipped by rail, most of it up to Prince Rupert and some to Seattle and thence by boat to Valdez.

“Q. Can you tell us generally how many carloads of equipment were shipped? [223]

“A. My estimate would be about one hundred carloads.

“Q. What, if anything, was done about recruiting common labor, truck drivers and equipment operators?

“A. In this arrangement to have unit contractors perform the actual construction operations, each one of the unit contractors employed their own organization supervisory force, laborers, truck drivers, and other workers, skilled and semi-skilled. The Lytle and Green organization employed the administrative and general supervisory forces of the managing contractor.

“Q. State who selected the individual workmen and made the arrangements in respect to their pay and transportation to go on the job?

“A. Lytle and Green selected the management contractors' organization and each one of the unit

(Deposition of D. W. Clayton.)

contractors selected their own working personnel, subject, of course, to the approval of the Public Roads Administration.

“Q. And about when did operations begin on the construction in Alaska?

“A. About July 1st, 1942; I would say about July 1st.

“Q. And the assembling of this equipment, loading and arranging for its transportation and all of those things, when did that begin?

“A. In the latter part of May; about May 20th, 1942.

“Q. When did you go to Alaska?

“A. In 1942, I went there on September 1st.

“Q. And what was your position up there?

“A. In 1942? [224]

“Q. Yes.

“A. My time in 1942 was spent mostly in Seattle in arranging for supplies and the procurement and shipment of supplies to the project.

“Q. Now, after you got on the job up there, I will ask you whether or not these various unit contractors were assigned to different units?

“A. Different sections.

“Q. Different sections of the work?

“A. Yes, sir.

“Q. And who made those assignments?

“A. The managing contractor, Lytle and Green.

“Q. Now, in carrying on the work up there, that is the actual performance of it, who gave the orders

(Deposition of D. W. Clayton.)

and directions generally to the workmen as to the method, manner and means of doing the work?

“A. The unit contractors.

“Q. What representatives did the Public Roads Administration or the Federal Works Administration have on the job?

“A. Do you want the name of the person?

“Q. No, just the representatives.

“A. Oh, they had a resident engineering and auditing division, a complete engineering organization including field engineers.

“Q. Now, what did the resident engineers and field engineers do?

“A. They prepared the plans and outlined the scope of the operation.

“Q. Did they give any orders or directions to the indiv- [225] idual workmen on the job as to the manner, method and means of doing the work?

“A. No, sir.

“Q. I will ask you whether or not the general or project managers, that is what Lytle and Green were termed, I will ask you whether the project manager provided the method, manner and means of transportation of supplies and equipment and personnel and about the many other things probably that were necessary in the performance of this work?      A. Yes, sir.

“Q. And who selected the equipment for that?

“A. I did not quite follow you.

“Q. I say, who selected the equipment as between the government engineers or the project man-

(Deposition of D. W. Clayton.)

agers? What equipment did you use up there in the way of transportation?

“A. On the project?

“Q. Yes, on the project? A. Trucks.

“Q. And who furnished those?

“A. The Public Roads Administration.

“Q. And who directed their operations?

“A. You may also supplement that answer, the Public Roads Administration furnished the major items of trucking equipment but each individual contractor did furnish a few of their own private trucks and automobiles.

“Q. And who directed the movement of those transportation vehicles, trucks and automobiles, and so forth? [226]

“A. J. Leo Hoak; I can't recall whether he operated under Hoak Construction Company or Leo Hoak; he was one of the unit contractors.

“Q. He was one of the unit contractors?

“A. Yes, sir.

“Q. I will ask you whether or not he was under the direction of the project manager?

“A. Yes, sir.

“Q. Just what did the project managers do, what were the functions they exercised generally with respect to the job?

“A. The managing contractor?

“Q. Yes, the managing contractor, that is the project manager?

“A. Subject to the instructions and directions of the Public Roads Administration, they directed

(Deposition of D. W. Clayton.)

all of the construction activities of the unit contractor and furnished and provided and arranged for transportation of supplies to the project and the procurement of supplies and units of equipment required for special operation and provided housing facilities for all of the workmen, including the unit contractors' organization, and also kept the records as directed by the Public Roads Administration.

"Q. Who selected and hired the personnel to carry on the details of that work?

"A. They were selected by the Lytle and Green organization, managing contractors, subject to the approval of the Public Roads Administration. I do not want to repeat [227] too much here, but I do think it is important that we recognize that the Public Roads Administration were the directing agency.

"Q. Well, when you say they were the directing agency, do you mean generally? A. Yes, sir.

"Q. Did they give the men, individuals and drivers and so on, on the job, any orders?

"A. Oh, no.

"Q. When they wanted something done, how was the matter approached?

"A. The resident engineer would give the instructions, written usually, to the project manager who would then delegate the work to the unit contractor organization.

"Q. Now, with respect to discharging men on the job there, who did that?

(Deposition of D. W. Clayton.)

“A. Their terminations were arranged by the unit contractors and the project manager.

“Q. Mr. Clayton, I will ask you whether or not under the contract a schedule of wages was provided which was to be paid on the job? A. Yes, sir.

“Q. Do you know of any instances where there were departures from that schedule?

“A. No, sir.

“Q. When repairs to trucks and track lines and other equipment was deemed necessary, who determined that?

“A. The unit contractors determined that; the operators of the vehicle. [228]

“Q. Did the district engineer of the government attempt to supervise any details of the work, I mean the smaller details in carrying it out?

“A. No, sir.

“Q. I do not want to lead you, but if he wanted some particular thing done, like a bridge for instance, we will say, I will ask you whether or not he told you generally what he wanted, a bridge constructed, and then let the details of it to the unit contractor?

“A. Yes; of course, the government agency had inspectors to see that those instructions were carried out and to approve the completed work.

“Q. I will ask you whether or not that inspection and approval was carried on any differently than any other private contractor?

A. No, sir.

(Deposition of D. W. Clayton.)

“Q. Mr. Clayton, at the same time in the arrangement for employing workmen to go up there, I believe they were required, the workmen were required to sign Civil Service blanks or something, is that the fact?           A. Yes, sir.

“Q. Will you state how that came about, if you know?

“A. Well, there were a number of conditions of the contract and one of the conditions of the contract provided that the Public Roads Administration would pay the individual employees by government warrant for their services and at that time it developed that unless they were recognized as Civil Service employees they would not be eligible to receive government pay direct, so they were placed on temporary Civil [229] Service enrollment.

“Q. And they paid those workmen and others when?

“A. Generally from the time of departure from their point of hire.

“Q. For instance, if you had twenty-five truck drivers assembled at Sioux City, Iowa, to ship to this job, when would their pay start?

“A. From the hour of the departure of the train from Sioux City.

“Q. How often were they paid?

“A. Semi-monthly.

“Q. Twice a month?           A. Yes, sir.

“Q. I understand you to say those arrangements of having them designated Civil Service employees was temporary only?           A. Yes, sir.

(Deposition of D. W. Clayton.)

“Q. And after they got on the job and got to going up there, was that abandoned, I am talking about the workmen, after the workmen got up on the job there? A. No, sir.

“Q. In answering that question do I understand you to mean that so far as the giving of orders was concerned and obeying orders and carrying out all of the details of the work and method of it, there was no difference after Civil Service was abandoned than before? A. No, sir.

“Q. Now, when men were through up there, completed their [230] work and were ready to depart and leave Alaska to go back or ready to leave Alaska, who arranged for their transportation?

“A. The management contractors.

“Q. How were they transported from the site, from the place where they were when they were through, to rail transportation, we will say?

“A. Well, we used all of the available means of transportation; some of them returned by truck from the project through Valdez and thence by water transportation to Seattle, and thence by rail to their point of hire. Some of them came out directly from the nearby airports.

“Q. When this truck and automobile agency was employed, who selected the trucks and drivers and gave them the directions?

“A. The unit contractor, Hoak.

“Q. I will ask you whether or not Mr. Hoak was under the general direction of the general project manager? A. He was.



(Deposition of D. W. Clayton.)

“Cross Examination

“By Mr. Sager:

“Q. When did you come out to Seattle, Mr. Clayton, in 1942 in connection with this Alaska project?

“A. I arrived in the latter part of May.

“Q. And then you were in Seattle until September? A. Yes, sir. [231]

“Q. And then went up to Alaska on the job?

“A. Yes, sir.

“Q. Were you in the Sioux City offices prior to May? A. Yes, sir.

“Q. Were they then the project manager, of these defendant companies, were they then preparing or getting ready to perform this contract?

“A. Yes, sir.

“Q. Were they recruiting labor at that time?

“A. Yes, sir.

“Q. And that is, around Sioux City, Iowa?

“A. Yes, sir.

“Q. When were these men placed under Civil Service?

“A. Prior to their departure from the point of hire.

“Q. They were put under Civil Service at the same time or in conjunction with their employment, with their hiring out? A. Yes, sir.

“Q. And who looked after the mechanics, that is, the filling out of forms and that sort of thing, necessary to place them under Civil Service?

(Deposition of D. W. Clayton.)

“A. The Lytle and Green organization, with the assistance of the Public Roads Administration.

“Q. By the way, were you put under Civil Service?

“A. No, sir, not the first year.

“Q. Were you at any time? A. No.

“Q. Were any of the Lytle and Green organization put under Civil Service? [232]

“A. All of them except O. W. Crowley and myself.

“Q. Who was O. W. Crowley?

“A. He was project manager.

“Q. You were the assistant manager?

“A. Yes, sir.

“Q. All of the rest of the Lytle and Green organization were Civil Service appointees except you two? A. Yes, sir.

“Q. Now, what about the unit contractors and their personnel, were they all placed under Civil Service?

“A. All except one representative of each unit organization.

“Q. And of course, every one who was a Civil Service appointee was paid by a government check, is that right? A. That is correct.

“Q. So I take it that the foremen or superintendents, or whatever their titles were who were actually on the job directing the work, the individual details of the work, were Civil Service appointees? A. Yes, sir.

(Deposition of D. W. Clayton.)

“Q. Am I right in assuming that of all of the men on the job in Alaska under this contract and unit contractors, there were not to exceed fifteen, approximately, who were not Civil Service appointees? A. That is right.

“Q. That would be two in the management organization and one in each of the organizations?

“A. Yes, sir. [233]

“Q. And they were under Civil Service from some time prior to their departure from Iowa?

“A. Yes, sir.

“Q. Until some time after 1942?

“A. Yes, sir.

“Q. When a person was discharged from his employment, was that discharge subject to Civil Service approval?

“A. Subject to the approval—I am not familiar about the Civil Service arrangement, but it was subject to the approval of the resident engineer.

“Q. That is the government engineer?

“A. Yes, sir.

“Q. The resident engineer? A. Yes, sir.

“Q. Now, you stated I think that there were no departures from the schedule of wages specified in the contract; were there occasions where a particular employee may be advanced in his position so that his individual wage would be increased?

“A. Reclassified.

“Q. Reclassified? A. Yes, sir.

“Q. Were those changes or reclassifications sub-

(Deposition of D. W. Clayton.)

ject to the approval of the Civil Service, or were they under Civil Service regulations?

"A. Yes, sir.

"Q. Do you know whether or not in 1942 there were any employees on this project, either of the project manager or the unit contractors, who were injured [234] while on the job? A. Yes.

"Q. Do you know whether or not they were compensated under the provisions of the Federal Compensation Acts? A. Yes, sir.

"Q. And were paid through the Federal Compensation Commission? A. Yes, sir.

"Q. What, generally, was the contract of this Mr. Hoak, contractor, or whatever it was, did he have some particular duty?

"A. He had charge of all of the transportation of supplies and materials.

"Q. He was not engaged in construction?

"A. No.

"Mr. Sager: That is all.

"Redirect Examination

"By Mr. Peterson:

"Q. Who selected the Hoak Company?

"A. The project manager.

"Q. Now, Mr. Clayton, an oiler or shovel runner, that called for a different scale of wages, did it not? A. Yes, sir.

"Q. Now, just what did the project manager do when he wanted to advance a certain employee's wages by reclassification, as you called it?

(Deposition of D. W. Clayton.)

"A. The unit contractor would recommend, make an application and recommend that the employee be reclassified [235] at the higher scale and rate and then the management director prepared the reclassification and took it to the resident engineer for approval.

"Q. And got his okeh on it? A. Yes, sir.

"Q. And that proposition, was that handled any differently after Civil Service was abandoned?

"A. No, sir.

"Q. It was the same all of the way through?

"A. Yes, sir.

"Q. And that was because the government was paying the bills?"

Mr. Sager: There is an objection to that question and Mr. Peterson agreed to strike it.

Mr. Peterson: That is right. "Yes, strike it out."

"Q. Now, I will ask you whether or not there were cases where the project manager made expenditures and received reimbursements from the government? A. Yes, sir.

"Q. Was that in many instances?

"A. No, sir, that was only in cases of expediency and he could make procurement more readily than through government channels and with the prior approval of the resident engineer.

"Q. Now, when was this Civil Service arrangement abandoned?

"A. About the first of February, 1943.

"Q. Where was this arrangement made?

(Deposition of D. W. Clayton.)

“A. In Washington.

“Q. You were present, were you? [236]

“A. I was present at the preliminary discussion but I was in Edmonton when that occurred.

“Q. I will ask you whether or not the Public Roads Administration requested that the Civil Service arrangement or proposition be abandoned?

“A. Yes, sir.

“Mr. Sager: Wait a minute. He is probably testifying as to hearsay there.

“A. No, that was not hearsay because I was in the discussion at Washington, D. C.

“Q. I will ask you whether or not you discussed the matter with the representative of the Public Roads Administration or officers?

“A. Yes, sir.

“Q. With whom did you discuss it first?

“A. Mr. Helmintoller.

“Q. And what was his position?

“A. I don't know his exact title, but he was chief accountant and finance officer of the Public Roads Administration.

“Q. And anybody else? A. Mr. Bright.

“Q. What was Mr. Bright's position?

“A. He was the district engineer.

“Q. Where did you have that discussion at?

“A. Washington, D. C. at the Public Roads Administration office.

“Q. I will ask you whether or not you ever discussed it in Edmonton, Canada, before you went to Washington? [237]

(Deposition of D. W. Clayton.)

“A. No, sir, that was subsequent.

“Q. How long following that was this plan of having these men sign Civil Service blanks abandoned?

“A. Immediately.

“Q. Now, I will ask you whether or not the government continued to pay checks direct to the men until the completion of the job?

“A. Yes, sir.

“Q. In hiring these men you wanted to hire, say, a shovel runner in Sioux City, Iowa, when he started this job was he required under the Civil Service proposition to take any examination?

“A. A physical examination and a questionnaire as to his experience.

“Q. I will ask you whether or not that was required of all the employees?

“A. All employees.

“Q. Was there any instances that you know of where a unit contractor or project manager selected an employee who was rejected by the government?

“A. No, sir.

“Mr. Sager: Q. This physical examination and questionnaire examination was made pursuant to the requirements of the Civil Service regulations?

“A. Yes, sir.

Mr. Sager: There is an objection, however.

“Mr. Peterson: I object to that as calling for a conclusion of the witness.

“Mr. Sager: Well, then, I will ask the question

(Deposition of D. W. Clayton.)

this way, the physical examination and the [238] information required in the questionnaire was not a requirement of the unit or project managing contractors?      A. No.

“Q. It was required by the Civil Service?

“A. Yes, sir.

“Mr. Sager: That is all.

“Mr. Peterson: Q. Was there any exception in this Civil Service matter until the project manager requested the government to pay the employees direct?      A. No, sir.

“Mr. Sager: Q. Well, of course, the request to pay direct went through before any personnel were recruited, did it not?      A. Yes, sir.

“Mr. Sager: That is all.

“Mr. Peterson: Mr. Sager, are you agreeable to waiving the signature and the reading of the deposition by the witness?

“Mr. Sager: Yes, I will so stipulate.”

Mr. Conley: Witness excused.

Mr. Peterson: We ask that the original be filed.

The Court: It may be filed.

Mr. Sager: I would like to make those corrections in the original.

The Court: Yes. [239]

Mr. Peterson: Mr. Rowland, will you take the stand, please.



I. C. ROWLAND,

recalled as a witness on behalf of the Plaintiff, was examined further and testified in rebuttal as follows:

Direct Examination

By Mr. Peterson:

Mr. Peterson: Mr. Rowland, you have been sworn. I am not sure whether in your redirect examination the other day I covered this matter of the meeting you had with Mr. Scadden, leading up to the cancellation.

A. I can't hear you.

Mr. Peterson: I am not sure I covered—never mind, I will go ahead and ask the question.

Q. Mr. Rowland, there has been reference to the Okes Construction Company contract in this case by Mr. Northrup. What portion of this Alaska Highway did the Okes Construction Company cover?

A. From I believe Fort St. John to Fort Nelson.

Q. Fort St. John, British Columbia, to——

A. Fort Nelson, British Columbia.

Q. That is a distance of how many miles? [240]

A. I think——

Q. Approximately.

A. Approximately, I think 250 miles.

Q. Yes, and did you or your company, or your agency, have any insurance coverage with respect to that job? A. Yes, we did.

Q. And what was the nature of that coverage?

A. Compensation insurance on employees en-

(Testimony of I. C. Rowland.)

gaged in performing the work for the Okes Construction Company, and their associated and affiliated and associated contractors.

Q. Workmen's Compensation was compensation for injuries and loss of time when workmen were injured, as the result of any casualty?

A. In the performance of his work.

Q. Medical expense as well?

A. No, our policy did not provide we should pay the medical. The medical I believe was provided by the Public Health Service.

Q. Beg your pardon?

A. The medical, I believe, was provided by the Public Health Service.

Q. And along about the first of August, did any controversy arise with reference to that Okes Construction Company job?

A. Yes, a little later than that.

Q. When did it?

A. Along about August the 10th.

Q. Yes, and how did that come about, Mr. Rowland?

Mr. Sager: Oh, I think that is immaterial, [241] Your Honor.

Mr. Peterson: I think I will connect it up and show——

The Court: Objection will be overruled.

A. About that time our claims representative, who we had sent to Fort St. John, advised us that the British Columbia Compensation——

Mr. Sager: Just a moment, I object to that.

(Testimony of I. C. Rowland.)

The Court: Yes, I think so.

Q. They were working under your directions, your claims department? A. Yes, he was.

Q. Yes, and in the course of their employment, they had advised you what?

Mr. Sager: Well, I object to that.

Mr. Peterson: I think he was—we have a right to show what an employee acting under his——

The Court: Well, it is awfully close to the hearsay rule.

Mr. Peterson: Not what he said, but just the facts.

Mr. Sager: It is hearsay evidence.

The Court: I think I shall let him answer.

Q. Don't tell what he said, but what he advised you of.

A. He advised that the British Columbia Compensation Board was interfering with the loss of settlements and payments to these injured workmen.

Mr. Sager: I object to that, it is purely hearsay, no possible way of cross-examining whether the British Columbia Board was ever doing—— [242]

The Court: Well, the substance of it was that there was some difficulty arose with the British Columbia Board and that caused the discussion on the Okes contract. The Court is admitting this only because these two controversies apparently have become interwoven, in these contracts by the testimony that has gone in, but I do not mean of course to throw down the bars and let all conversations of

(Testimony of I. C. Rowland.)

that kind or history of the Okes contract become a part of this.

Mr. Peterson: I don't want to do that.

Q. Under your coverage of the Okes Construction Company, how was that written, under what plan?

A. It was insurance policy agreeing to pay federal harbor workers and longshoremen benefits, to these injured workmen, excluding medical attention.

Q. You refer to the federal workers——

A. Federal harbor workers.

Q. And Longshoremen's Act of the United States? A. That is right.

Q. What if anything did the Canadian authorities do with respect to taking jurisdiction of the injured workmen and their claims?

A. Well, they never, during our time on the risk, absolutely took possession of the claims, because on about August the 20th I went to Vancouver and called on the British Columbia Compensation Board to inquire——

The Court: I think——

Mr. Sager: Just a moment, I am going to object to all this controversy.

The Court: We are not trying the Okes contract. [243] The fact there was a controversy arose that led to some discussion with the federal authorities and involved itself with the policy and the compensation or the payments of it here in question——

Q. State just what the controversy involved, just briefly.

(Testimony of I. C. Rowland.)

A. It related to whether the order in council had been issued by the Dominion Government, setting aside the British Columbia Compensation Act, whether they had the jurisdiction over the Okes Construction Company employees or not.

Q. Had it been set aside, what would have been the scheme of insurance?

Mr. Sager: I am objecting to all this line of conversation.

The Court: You may answer.

A. If the order in council had been issued?

Q. Yes.

A. Then the Federal Harbor Workers' Compensation Act would have applied and the benefits would have been properly payable under that.

Q. I will ask you whether the contract of the Okes Construction Company was written on the representation that such an order in council had been made? A. It was.

Q. And did you ascertain after the coverage had been made whether or not an order in council had been made? A. It had been represented——

The Court: I don't see the materiality of this, Mr. Peterson. I do not see how it ties in with the issues. [244]

Mr. Peterson: I am going to tie it in with Mr. Northrup's activities.

The Court: That matter may still be a matter in dispute in the administrative agency of the government whether we can or cannot pay it, we cannot make or destroy that case.

(Testimony of I. C. Rowland.)

Mr. Peterson: I realize that. It simply leads up—it is a preliminary matter. As a matter of fact, it is preliminary, leading up to this discussion with Mr. Scaddon.

The Court: I think you have covered it sufficiently preliminary to show——

Mr. Peterson: Very well.

Q. Now, I will ask you whether or not you had a conference with Mr.—well, what did you do with respect to the British Columbia coverage or the Okes Construction Company coverage?

A. Immediately on my return, I served a notice of cancellation.

Q. On the contractor?

A. On each of the contractors, terminating the coverage as provided by policy provisions.

Q. When was that notice of cancellation served?

A. Along the latter part of August in 1942.

Q. I will ask you whether or not following that you were contacted by any of these representatives of Mr. Northrup's department of the government?

A. Mr. Northrup called me on the telephone, and Mr. Scaddon—Mr. Northrup was in Washington and Mr. Scaddon was in San Francisco, and he called me from San Francisco [245] requesting I withdraw the cancellation notice.

Q. And did you thereafter have a meeting with Mr. Scaddon?      A. Yes, sir, I did.

Q. Where?      A. In Tacoma, here.

Q. And about when was that meeting held?

(Testimony of I. C. Rowland.)

A. I can't give you the exact date, but some time in the latter part of August or early September.

Q. August, 1942? A. Yes.

Q. And was there anything said during that discussion about the Lytle-Green insurance?

A. Yes.

Q. Just state what occurred in that connection?

A. Mr. Scaddon told me that if I did not withdraw the cancellation notice on the Okes Construction Company, that he would cancel the policy of the Lytle and Green Company on the Slana job.

Q. What did you say to Mr. Scaddon?

A. I told him he had no authority to give me any notice of cancellation on Lytle and Green, and I would not accept any from him. It would have to come from the assured.

Q. And the assured were?

A. Were Lytle and Green, and the associated contractors.

Q. And then, in pursuance of that, you received the—did you thereafter receive cancellation notice from the assured?

A. Yes, we received the requested cancellation from Lytle and Green. [246]

Q. Prior to that time, had there been any objection of any kind made to you by anybody with respect to this binder you had issued?

A. No, sir.

Q. On the 17th of June I think it was 1942?

A. On Lytle and Green?

(Testimony of I. C. Rowland.)

Q. Yes.           A. No.

Q. By anybody?       A. No.

Q. P.R.A. or anybody else?       A. No.

Q. Had there been any objections of any kind, or requests for modifications or that changes be made with respect to the binder, or the policy which was issued, I think you testified on July 30th, 1942, prior to the cancellation?

A. Prior to this period when——

Q. Yes.           A. No.

Mr. Peterson: Cross-examine.

#### Cross Examination

By Mr. Sager:

Q. Didn't you discuss this Lytle and Green coverage in Washington when you were back there with and saw Mr. Northrup?

A. Only telling him we had the coverage on.

Q. Didn't he at that time tell you that the premium was all out of line, they would not pay it? [247]

A. No, not on Lytle and Green. The discussions in Washington were centered all on Okes Construction Company.

Q. Didn't he tell you——

Mr. Peterson: Let's fix the time of that conversation in Washington, please.

Q. Well, it was about ten days after the latter part of June, is that correct, Mr.——

A. I couldn't——

Q. You testified about it the other day.

A. Whatever I testified was the date. I can't tell you, I can't remember.



(Testimony of I. C. Rowland.)

Q. It was——

A. Some time along in there.

Q. It was on your trip back there which you made, I assume, directly after seeing Mr. Northrup, is that right? Your first meeting with Mr. Northrup in Seattle was at your request, is that true?

A. I don't know whether or not I talked with him—I know I told the boys to arrange a meeting. I don't know whether I did it or who did it.

Q. You called upon him in Seattle to discuss these two coverages, the Okes and the Lytle and Green, which you were about to put into effect?

A. No, I called on him to discuss the Okes Construction Company, the compensation risk. This had already been completed. We bid on the Lytle and Green business. We were invited to bid, and we submitted our proposal and we had already been awarded the business.

On the Okes Construction Company it was an entirely different situation. There had been no agreement. [248] There had been no arrangement as for rates or whether or not we were going to write the premiums on—and at that time the contractors for Okes Construction Company were moving large amounts of equipment, and some controversy arose in St. Paul because this equipment was not insured, and the banks objected to it going into Canada, with the result that the Okes Construction Company telephoned us to fix some all risk contractors' equipment insurance, and we attached the risk.

(Testimony of I. C. Rowland.)

Q. Now, that Okes contract coverage was another cost plus contract, or the same as Lytle and Green?

A. Well, I have never seen their contract, but I understand it is a cost plus contract.

Q. And your contract with them did not name the government as an assured, did it?

A. No, it did not.

Q. Why were you talking to Mr. Northrup about either of these contracts?

A. Because Mr. Okes had told me that either Mr. Northrup had been in St. Paul, or there had been a contract somewhere—I don't know where, and Okes asked me to discuss the subject with Northrup.

Q. You knew who Mr. Northrup was?

A. I did not know until I met him here in Seattle. I had never met the gentleman before.

Q. Well, did you know who he was with, or who he represented?

A. I knew he was with the P. R. A.

Q. And in charge of their insurance matters?

A. He represented that to me, to be a fact.

Q. Didn't Mr. Okes represent that to you? [249]

A. Mr. Okes said he was with the P.R.A.

Q. And you would have to talk with him about the insurance?

A. To discuss the matter, the insurance, with Mr. Northrup.

Q. Well, he told you that Mr. Northrup had something to do with the approval of it, didn't he?

(Testimony of I. C. Rowland.)

A. I testified he asked me to see Mr. Northrup.

Q. Why were you seeing Mr. Northrup if he did not have anything to do with this insurance?

Mr. Peterson: Your Honor, the contracts provide here, with the approval of the district engineer, the insurance——

Mr. Sager: Or his representative.

The Court: Objection will be overruled. You may answer.

A. My client was the Okes Construction.

Q. Why were you talking to Mr. Northrup, then?

A. Well, will you let me answer the question or not?

My client was the Okes Construction Company and they directed that I see Mr. Northrup for the purpose of discussing the form and type of coverage that we were going to attach, and also to discuss with him this contractors' equipment policy.

Q. Well, did you understand that Mr. Northrup was representing Okes?

A. No, I just testified he was with the P.R.A.

Q. And when you went back to Washington and called on Mr. Northrup in Washington to discuss these contracts or either of them, why did you do that?

A. Because Mr. Northrup when he was in Seattle, asked that when I was in Washington that I do call on him relative [250] to these contracts and we would at that time endeavor to work out a plan of operation, and a plan of writing the business.

(Testimony of I. C. Rowland.)

Q. Well, you recognized then that he had something to do or say about these contracts?

A. Yes, that is true.

Q. And you were seeking his approval?

A. No, I was not.

Q. Well, you were submitting your plans and policies to him?

A. I was discussing—we hadn't any policies drawn at that time.

Q. Well, you had a binder?

A. We had a binder at that time.

Q. You sent him a copy of it?

A. I think we did, yes.

Q. And in that meeting in September, the first part of September in Mr. Bright's office in Seattle, where both Mr. Scaddon and Mr. Northrup were present——

Mr. Peterson: That is objected to as not cross-examination.

The Court: Objection will be overruled.

Mr. Peterson: Exception.

Q. You were discussing both of these policies at that time with Mr. Northrup, and Mr. Scaddon?

A. Mr. Northrup and Mr. Scaddon were discussing them with me.

Q. Well, you were in their office, were you not?

A. Yes. at their invitation.

Q. And the Lytle and Green policy had then been cancelled? A. It had.

Q. When were you first notified to cancel the policy? [251] A. Which policy?

(Testimony of I. C. Rowland.)

Q. The Lytle and Green.

A. Well, I can't answer that. It would be some time after the 20th of August, 1942. The exact date, I can't fix from memory, because it followed my return from Vancouver, at the time I had received the cancellation on the Okes Construction Company.

Q. And who notified you?

A. You mean when the cancellation was finally effected?

Q. Who notified you to cancel the Lytle and Green?      A. Lytle and Green.

Q. Well, what person?

A. Well, I don't know who signed the letter.

Q. Was your first information of that by letter, or did they notify you orally?

A. Lytle and Green?

Q. Yes.

A. Well, Mr. Scaddon was the one that threatened the cancellation orally, and when I told him I would not accept a notice of cancellation from him, then he turned around and said, "I will instruct the contractors," and I said, "I can't help it, if the contractor asks for a cancellation I will have to cancel it according to its provisions."

Q. Mr. Scaddon said he would instruct the contractors to cancel?      A. Yes.

Q. When was that? A meeting here in Tacoma?

A. After I returned from Vancouver.

Q. That was a meeting here in Tacoma?

A. The same thing was reaffirmed in Seattle.

(Testimony of I. C. Rowland.)

Q. Your Seattle meeting was about the 1st or 2nd of September?

A. Along in there some time.

Q. So that your meeting with Scaddon was apparently some few days before that?

A. Yes, sir, it was between the 20th and the 1st. I don't know, Scaddon was first in San Francisco, and he called me from San Francisco, and then he was up here. He was in and out.

Q. Scaddon also was representing the government or some agency of the government?

A. Some agency of the government.

Q. With respect to insurance matters?

A. Yes, sir.

Q. On these contracts?

A. Well, I don't know what contracts.

Q. Well, you at least were talking to him about the insurance coverage on these contracts?

A. Started off on the Okes Construction Company contract.

Q. And immediately after Scaddon told you that he would instruct the contractor to cancel it, you were notified of its cancellation?

A. We received a telegram or letter, I don't know which, from the contractor.

Q. Didn't the contractor when he gave you the first notice of cancellation, advise you that he was cancelling it at the instance of the P.R.A.?

A. The letter would show that, I don't know what the letter says.

(Testimony of I. C. Rowland.)

Q. Has that letter been put in evidence? [253]

A. I don't know.

Mr. Peterson: The cancellations are all here in evidence.

Q. Well, you received actually these letters of cancellation, these formal letters of cancellation, you received some time later at your request?

A. Yes, sir, we got the notice of cancellation from Lytle and Green long prior, those were drawn up afterwards.

Q. Do you have that letter?

A. I haven't got it.

The Court: Long prior to what do you mean?

A. To these formal cancellations. You see, we had to get a cancellation from each one of these unit contractors, but Lytle and Green for the purpose of cancellation had the authority to request it. The policy recited they had the authority to request the cancellation.

The Court: I think we will take the morning intermission now of fifteen minutes, and you can check up and find the documents.

(Recess.)

Mr. Peterson: If I may, I would like to ask the witness another question or two.

Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, did you have any discussion with Mr. Rice as to providing for personnel to handle claims and [251] facilities in the vicinity of this work in Alaska?

(Testimony of I. C. Rowland.)

A. Yes, he wanted to know what facilities we had, and then I advised him what arrangements we had up there for the handling of our Alaska business.

Q. What did you tell him?

A. I told him we had representatives at different parts of Alaska that were prepared to handle these claims.

Q. Did you tell him who your representatives were?

A. I told him who we would assign to handle these claims, and we did make the assignments.

Q. Who did you tell him?

A. A man by the name of Hodge at Cordova, who is an attorney, and an attorney at Fairbanks, Alaska.

Q. And his name?

A. I think it was Klege.

Q. I will ask you whether or not in connection with that you furnished him with blank forms on which to report their claims?

A. We furnished Lytle and Green with a supply of forms to be distributed to the different unit contractors. We also supplied the claims' men with all the necessary forms for handling and investigating the claims.

Mr. Peterson: I think that is all.

#### Recross Examination

By Mr. Sager:

Q. By the way, Mr. Rowland, did you receive



(Testimony of I. C. Rowland.)

copies from Mr. La Rocque of the letters he was writing to Mr. Northrup?

A. I don't know, I don't know what letters you refer to. [255]

Q. I think most of them are incorporated in this exhibit.

A. I have some, but I can't tell you.

Q. As a general practice, where you acted as agent in a coverage of this sort, did the home office keep you advised of their correspondence?

A. Not generally, there is nothing in our arrangements that compels them——

Q. Would you then examine that exhibit and state whether or not he sent you copies of his letters in there?

Mr. Peterson: Are those the letters we agreed on over at my office? I think he examined them at that time and agreed they were copies he received.

A. These are the ones we checked over there against the files.

Mr. Sager: I do not want to mislead you, they are not all letters that you checked—all of the copies you checked, but there are some originals then from Mr. La Rocque, the original letters. Now, those you did not check.

Mr. Peterson: How many letters are there, there, Mr. Sager, if I may inquire?

Mr. Sager. There are probable ten or twelve.

Q. Now, Mr. Rowland, showing you Defendants' Exhibit A-13, and ask you if you have seen that before?

(Testimony of I. C. Rowland.)

A. It is a cancellation request for cancellation.

Q. That is the first notice of cancellation you obtained from the company, from Lytle and Green?

A. I don't know. There is another letter there—I don't know the date of it. That is addressed I notice to our Seattle office, the copy of it is. [256]

Q. No, this is addressed to the Tacoma office.

A. Is it?

Q. Yes.

A. Oh, yes, I notice there is a copy sent to our Seattle office.

Q. But that was the formal cancellation, isn't it, or notice of cancellation?

A. May I see the other letter? No, that is not the one.

Mr. Peterson: Let me see that letter, please, Mr. Rowland.

Oh, it is the one containing the copy of the telegram. A. What was the question, again?

Q. I think my last question was whether Defendants' Exhibit A-13 was the first notice of cancellation you received from Lytle and Green?

A. No, here is a letter dated September 2nd, from Lytle and Green, which was received in our Seattle office on September the 3rd, 1942, and was received at Tacoma on September the 4th, 1942.

Mr. Sager: I will offer them both, if you haven't any objection.

A. (Continuing): The other letter is dated September the 3rd, 1942, and was received in our Tacoma office on September the 5th, 1942.

(Testimony of I. C. Rowland.)

Q. The one you are referring to is Defendants' Exhibit——

A. The last one, Defendants' Exhibit A-13.

Q. The other one is not marked——

Mr. Sager: I will have that marked and offer them both. [257]

Mr. Peterson: No objection.

Mr. Sager: We offer Defendants' A-13 and A-14, Your Honor.

The Court: They will be admitted in evidence.

(Whereupon, letters referred to were then received in evidence and marked Defendants' Exhibits A-13 and A-14, respectively.)

DEFENDANTS' EXHIBIT No. A-13

C. F. Lytle Company and Green Construction Co.

Sioux City, Iowa [cut]

Offices: Slana, Alaska, Seattle, Washington,

Des Moines, Iowa, Sioux City, Iowa

September 3, 1942

Hansen & Rowland, Inc.,

Tacoma, Washington

Phoenix Indemnity Company

Policy CLP 1750

C. F. Lytle Company and

Green Construction Company

Gentlemen:

In accordance with instructions from the Public Roads Administration, you are requested to cancel as of September 1, 1942, the above captioned com-

(Testimony of I. C. Rowland.)

prehensive liability policy, covering C. F. Lytle Company and Green Construction Company and the construction contractors under the Lytle and Green Engineering-Management Contract.

We ask that you kindly acknowledge receipt of this notice to this office.

Your very truly,

C. F. LYTLE COMPANY and  
GREEN CONSTRUCTION COMPANY

By H. L. RICE

(H. L. Rice)

Assistant Secretary

C. F. Lytle Company

HLR.amc

cc J. S. Bright, District Engineer, P.R.A., Hoge  
Building, Seattle, Wash.

Seattle Office, C. F. Lytle Company and Green  
Construction Co.

Gulkana Office, C. F. Lytle Company and Green  
Construction Co.

[Endorsed]: Admitted Sept 8, 1944.

(Testimony of I. C. Rowland.)

DEFENDANTS' EXHIBIT No. A-14

C. F. Lytle Company and Green Construction Co.

Sioux City, Iowa

[cut]

Offices: Slana, Alaska, Seattle, Washington,

Des Moines, Iowa, Sioux City, Iowa

September 2, 1942

Air Mail

Hansen & Rowland, Inc.,

Dexter-Horton Bldg.,

Seattle, Washington.

Gentlemen:

We acknowledge receipt of your wire as follows:  
Mr. Scadden Telephoned This Morning Stating He  
Had Replaced Our Policy With Another Policy  
Effective 12:01 AM September 1 Name Not Given  
Stop We Advised Scadden Could Only Accept Can-  
cellation From Named Assured Lytle and Green  
And To Forward Request For Cancellation To Us.

The procedure that Mr. Scadden has taken is  
hardly in accordance with the terms and intent of  
our contract. We will be anxious to know, of  
course, if the policy purchased gives our contractors  
the same coverage as the one we now have and in  
a company with claim facilities available to service  
the contract. We will await advices and instructions

(Testimony of I. C. Rowland.)

from the Public Roads Administration, and govern ourselves accordingly.

Very truly yours,

H. L. RICE

H. L. Rice

HLR/hs

CC/Lytle & Green, 506 Smith Tower, Seattle,  
Washington.

[Endorsed]: Admitted Sept. 8, 1944.

---

Q. Now, Mr. Rowland, did I understand that in the meeting with Mr. Northrup at Seattle the latter part of June, that—I don't want to mislead you, did you testify or did you say that the Lytle and Green policy or coverage was not discussed at that meeting?

A. No, I told Mr. Northrup that we had the policy at that time.

Q. I see.

A. He asked me if we had written any other business on these contracts.

Q. Now, showing you Defendants' Exhibit A-4, I will ask you to examine that and ask you if that is not a letter that you wrote within a day or so after that June meeting in Seattle?

A. Yes, this is a letter I wrote.

Q. Just immediately—practically after this June meeting with Mr. Northrup?

A. Yes, this is dated July the 30th.

(Testimony of I. C. Rowland.)

Q. Isn't that dated——

A. I beg your pardon, it is July 30th, 1942.

Mr. Sager: Let me see that. I am sorry, I gave you the wrong exhibit, Mr. Rowland, it is A-1,—Defendants' Exhibit A-1. [258]

A. And you asked—what was the question?

Q. Now, that is a copy of a letter you wrote to Mr. Northrup almost immediately after this June meeting?

A. On June 27th, 1942.

Q. And that just followed this meeting in Seattle with Mr. Northrup?

A. Yes, it did.

Q. Now, I want to call your attention to the paragraph—it is the fourth paragraph on the second page of that letter. Do you find that?

A. Yes: "We have also bound Underwriters at Lloyd's, London."

Q. You say, "We have also bound Underwriters at Lloyd's, London against all risk of loss and damage to contractors' equipment, supplies, stores, temporary structures, forms, etc., as more particularly set forth in the form left with you last night".

That insurance was directed cancelled by Mr. Northrup, was it not?

A. No, Mr. Northrup had nothing to do with that. If you will notice this letter, on the first page carried two captions.

Q. I appreciate that.

A. And that——

Q. Didn't Mr. Totten—Mr. Totten was one of your representatives?

A. He was.

Q. And didn't he take copies of that policy to Mr. Northrup, at Washington?

(Testimony of I. C. Rowland.)

A. Say that again. [259]

Q. Didn't he take a copy of that coverage mentioned in that paragraph to Mr. Northrup at Washington, or at Seattle?

A. Yes, Mr. Northrup asked to see that copy, but this all has to do with Okes Construction Company and not Lytle and Green.

Q. I am aware of it, and didn't Mr. Totten report to you that Mr. Northrup said they wouldn't have that coverage?

A. That coverage was terminated.

Q. As the result of that conversation between Northrup and Totten?

A. No, not as a result of that conversation.

Q. As a matter of fact, it was cancelled or terminated as of the day it was written?

A. We did that as an accommodation, because the contractor had difficulty in—with these other contractors, I don't know what the arrangement was, but our negotiations on that were entirely with the contractor at St. Paul.

Q. But, don't you—

A. Mr. Northrup didn't know this was written at the time we told him.

Q. It was cancelled by the contractor at the direction of Mr. Northrup?

A. No, I don't—I don't think Mr. Northrup—I don't know what the arrangements between Northrup and the contractor were. We had our—

Q. Well, didn't Mr. Totten report to you after this meeting with Mr. Northrup in Seattle, at which



(Testimony of I. C. Rowland.)

time he took these policies to Mr. Northrup, and Mr. Northrup said he wouldn't have them and didn't want that coverage? [260]

Mr. Peterson: Just a minute, Your Honor. In accordance with the Court's ruling in my direct examination, this is not proper cross-examination. We are starting to try out this Okes business.

The Court: Objection will be overruled, and I might state, Mr. Peterson, the Court is overruling it for the reason that I permitted you in your direct examination to show some animus on the part of the Public Roads officials in cancelling the contract here in question, growing out of some transaction had in connection with the Okes contract.

Mr. Peterson: I am afraid, Your Honor misconstrued my purpose.

The Court: Well, the witness testified he was warned if he proceeded with the cancellation of the Okes contract, this would be cancelled, and immediately following, there was a cancellation.

The Witness: If you will permit me to get my files on this Lloyd's cover, or to review my files, I could answer much more intelligently than to sit here and talk from memory on a coverage that was terminated in 1942.

Q. Well, do you have any recollection of Mr. Totten reporting back to you, after taking those policies to Mr. Northrup?

A. I don't recall it, no.

Q. Now, the Okes policy you cancelled—

A. Yes, we cancelled it.

(Testimony of I. C. Rowland.)

Q. Sometime along the latter part of August?

A. I think about that. I don't know the date.

[261]

Q. And no premium had been paid on that?

A. No.

Q. That was finally adjusted by your home office, and Mr. Northrup, so that the period you covered in that contract was placed under this plan that Mr. Northrup was discussing here the other day?

Mr. Peterson: That is not cross-examination, we object to going into that matter. It is not cross-examination, Your Honor.

The Court: What is the purpose of it, Mr. Sager?

Mr. Sager: Well, it is material to show that the insurance company recognized a negotiation of Mr. Northrup in connection with this Okes policy. As a matter of fact, at the same time they were negotiating with Lytle and Green.

The Court: I do not want to get too far afield.

Mr. Sager: I am not concerned with what the actual final adjustment was, I merely want to show there was an adjustment after a period of negotiation on the Okes contract.

The Court: That general question he may answer.

A. There never was any adjustment, because at the time the Okes Construction Company policy was written, there were no rates agreed upon, and there were no terms and conditions agreed upon, and

(Testimony of I. C. Rowland.)

we got off the risk by cancellation before any agreement had been reached as to rates or method of writing or form of writing, and all of the discussions as to rates and form, took place after the [262] cancellation.

Q. Wasn't the policy issued?

A. The policy was finally issued.

Q. Didn't it state a premium?

A. I can't recall whether there—I believe we issued a policy on some form.

Q. Well, as a matter of fact, didn't the policy specify a premium of \$21.00 per hundred?

Mr. Peterson: I would like to inquire when this policy was written. I think it is back in 1943.

A. This policy I think was written in 1942. This policy was written in 1943—I can't answer that.

Q. The policy was cancelled long before the end of August?

A. The risk was cancelled.

Q. So the policy had been issued prior to that time?

A. I couldn't answer the date the policy was issued without referring to the file.

Q. There was a policy issued?

A. There would have to be a policy issued.

Q. You would not issue it after it was cancelled?

A. Yes, that is done frequently. You write a binder, you can't stand on the binder.

Q. Now, to go back to my prior question, when-

(Testimony of I. C. Rowland.)

ever the policy was issued, didn't it specify a premium of \$21.00 a hundred?

Mr. Peterson: Object.

The Court: He can answer.

A. I wouldn't answer it without reviewing the policy.

Q. You don't have any recollection of it?

A. Not now, since 1942. [263]

Q. Do you have the policy here?

A. I think it is in the file.

Q. Would you mind checking it?

Mr. Peterson: Your Honor, it seems to me we are getting away——

The Court: I do not want to take a great deal of time on this matter. I think the Court could assume there was some charge made for premium in a policy that was issued, but I can't see the materiality, whether it was a large one or small one.

Mr. Sager: I don't think it is material except Mr. Rowland said there never was any premium fixed, and hence there was no adjustment. That is the only thing.

The Court: I think he answered along more or less technical grounds the definition of the term adjustment, but the whole matter is not of any high degree of relevancy in this issue.

Mr. Sager: The only relevancy that I think it has, is to show that they dealt and negotiated with Mr. Northrup on these policies.

Mr. Peterson: You don't have to show the

(Testimony of I. C. Rowland.)

premium rate and terms of the policies and those things.

Mr. Sager: I would not, if I had direct answers to my questions.

Mr. Peterson: I think you are going too far afield. That is not proper cross-examination.

The Court: He says he has the policy.

Mr. Peterson: If the premium rate is injected into this matter, and it is considered material, I will [264] have to go into the coverage. I don't want to do that.

The Court: The rate is not material, no. He may answer as to whether there was a premium rate, and what it was, but as to what the coverage——

Q. I will ask you if you have that policy, if it fixed a premium?

A. The policy was actually issued apparently on the 1st of September, 1942, and the policy itself carried endorsements certifying this policy has been cancelled as of 12:01 a.m., September 1st. required notice thereof having been furnished to all interested parties.

The Court: The question is, does it carry a premium?

A. It carries a whole whole schedule of rates. There is one, two, three, four, five, six, seven, eight, nine, ten, eleven—twenty-four.

Q. Do each of those rates have a fixed premium?

A. Yes, each of those rates have a fixed premium for that class of work.

(Testimony of I. C. Rowland.)

Q. For that particular coverage?

A. No, the policy is the coverage. This is the classification of the work that is being done on the project.

Q. All right. Now, then, isn't it a fact that some—many months later, back in 1943, that a final negotiation of that contract resulted in the paying of a premium much less than the premium—

Mr. Peterson: I object, Your Honor please.

The Court: I think I will sustain the objection.

Mr. Peterson: Not cross-examination. [265]

Mr. Sager: I take an exception. I think it is proper to show negotiations between these parties.

The Court: That you have shown, and the fact that controversy was adjusted on some particular basis is not material at all, here, Mr. Sager, unless you propose to show that they recognized the same source of payment in that policy that they did in this policy, and that they looked to the Bureau of Public Roads to pay their bill here, rather than to Lytle—or Lytle and Green.

Q. Do you know who paid that premium?

Mr. Peterson: Objected to as not cross-examination.

The Court: Objection overruled.

A. Okes Construction Company, they were the assured.

Q. Did the check come to you or did it go to the home office?      A. That I don't know.

Q. Don't you know that it was paid direct by government check?      A. I don't know that.

(Testimony of I. C. Rowland.)

Mr. Peterson: Object to that as not proper cross-examination.

The Court: Objection overruled.

A. I don't know how the checks were paid. I didn't see them.

Q. You did not see them?

A. No, checks come in from every place.

Q. You do know that in your home office Mr. Northrup negotiated over that policy for a period of months?

A. This policy was written on a premium return plan, and there never was negotiations because there never was any agreement [266] as to how it should be written until after the policy was cancelled. We had a bad deal, we wanted to get out.

Mr. Sager: Now, subject to the question I asked him which he took some time to answer, he had to examine that exhibit—that is all of the cross-examination I have, I would like to have the opportunity——

The Court: Anything further Mr. Peterson?

Mr. Peterson: Nothing further, Your Honor.

Your Honor, I have some interrogatories if Your Honor wants to take the time, we are not going to be long this afternoon.

The Court: I want to ask the witness a question or two.

When you were negotiating to write this coverage, to whom were you looking for your payment of premium?

A. You mean, the Lytle and Green——

(Testimony of I. C. Rowland.)

The Court: Yes.

A. Lytle and Green.

The Court: And not to the government at all, nor any agency of the government?

A. No.

The Court: Did you know at that time that Lytle and Green were expecting to charge back to the government as an item of costs any premium that they would pay on this coverage?

A. I just assumed that, because that would be the natural course.

The Court: Had you seen the contract of employment between the government and Lytle and Green? [267]

A. No, sir.

The Court: But, did you then in any way rely upon the telegram that came signed "MacDonald," which is in this record I think as Exhibit 2, or 3, authorizing such coverage as may be necessary.

A. It had no bearing on it, because when I knew about that the coverage had already been effected.

The Court: Did you know this was a cost plus fixed fee contract?

A. Yes, I did. I knew it because Mr. Rice had told me it was a cost plus, and I knew the contractors on the highway were all under cost plus.

The Court: Then, when Rice wrote you a letter some time in February, I think, 1943, which is in this record as Exhibit—I can't give the number of the exhibit now. Anyway, it is a letter wherein he said he was surprised—he expressed in substance he



(Testimony of I. C. Rowland.)

was surprised that the matter had not been settled, and that the matter would be taken up with the Public Roads Administration, after you had submitted a bill for some sixteen thousand dollars. Did you then know that it was going to require, if it were charged as an item against this contract, some action on the part of the Public Roads Administration?

A. Well, I assume inasmuch as it was a cost plus contract that they were going to get the money from the government to pay. As I understood, there was some question as to their ability to finance the whole work.

The Court: Well, but did you understand the government was going to exercise some judgment in whether they would or would not pay the bill?

[268]

A. None at all. Rice told me that he had to get the money from the government before he could pay me.

The Court: And you looked to Rice for payment, or Lytle and Green, irrespective of whether the government allowed the claim or did not allow it?

A. Lytle and Green was the assured, and they were the only ones we could look to get our money.

The Court: When they advised you in their letter they were taking it up with the Public Roads Administration, you drew from that the inference they were just going to submit it?

(Testimony of I. C. Rowland.)

A. And get the money, and it would be reimbursed to them, and pay us.

The Court: If they did not get the money, what thought did you give to it?

A. We told them we were going to force collection on our premium. They owed us the money and we wanted it. We made several demands, verbally, and had sent representatives from our office back there.

The Court: But, did you or did you not understand—

Mr. Peterson: Letter of January 30th.

The Court: It was offered here as an exhibit, the original was.

The Clerk: I thought it was in the file.

The Court: I think there are copies of it running all through. Wasn't the original offered here?

Mr. Sager: Yes, the original.

The Court: One of the early exhibits.

Mr. Peterson: Written on Lytle and Green [269] stationery.

The Court: It is Plaintiff's Exhibit No. 14, wherein Mr. Rice said or wrote:

"Mr. Peterson of the Lytle and Green Seattle office is here at this time and expects to return to Seattle next week. I am asking him to take this up immediately with the P.R.A. office and try to get the matter disposed of without further delay."

Now, just what did you understand from that, Mr. Rowland?

(Testimony of I. C. Rowland.)

A. I understood that they were going to—that they probably could not pay the premium right at that time, and they wanted to get the money from the P.R.A. themselves in order to give me a check.

The Court: You did not conclude that they meant to infer or have you infer from this that as soon as the P.R.A. would recognize the claim, then it would be adjusted?

A. No. Frequently on these—

The Court: “It should have been paid long ago and we regret that it has not been properly taken care of.”

Now, what did you understand they meant when they said, “It should have been paid”, if they were to pay it?

A. We were asking them for the money all the time, and billing them for it, and having our field men call on them.

The Court: Well, did you interpret this language to be: “We should have paid the bill long ago”? [270]

A. Yes, they recognized they owed us the money.

The Court: “And we regret it has not been properly taken care of”.

A. We assumed from that they needed the financing in order to meet the bill the same as they had done on all other jobs,—all other parts of this job.

The Court: Well, in your negotiations with these

(Testimony of I. C. Rowland.)

people and in writing this coverage, did you assume that they could incur obligations and charge them against this job and have the government pay them?

A. I didn't know what the provisions of their contract with the government was, other than it was a cost plus contract, and generally on cost plus contracts the contractor bills the principal.

The Court: But, he can only charge such things as are essentially necessary to the project?

A. He couldn't charge anything that was not necessary.

The Court: And somebody has to exercise judgment and discretion in saying what is necessary and what is not necessary? A. Yes, sir.

The Court: And who did you think had that discretion?

A. Mr. Rice is the only man I knew.

The Court: That is all, I think—I just wanted to get that clear, because it is a matter of considerable importance in the case. [271]

By Mr. Sager: (Continuing)

Q. Well, Mr. Rowland, you understood from this letter that he was taking it up with the P.R.A., to either get the money from them or to get their reaction to it?

A. No, there was no reaction to come, to get the money I supposed.

Q. You said you made several oral demands for payment of this? A. Yes, sir.

(Testimony of I. C. Rowland.)

Q. Who did you make that upon?

A. I was in Sioux City once myself. I can't figure the dates, and following Miller's trip I had Jacobson, I believe, and I had Dahl.

Q. Who were they?

A. They were employees of our office.

Q. Well, did you make any oral demands yourself?

A. Yes, when I was in Sioux City I asked him for the money.

Q. From Mr. Rice?           A. Yes.

Q. What did he say then?

A. He said it would be forthcoming.

Q. Well, from the P.R.A.?

A. No, he never—he just said it would be forthcoming. It would be paid.

Q. Didn't you—you knew at that time that this thing was being talked about and discussed by Mr. Northrup and Mr. La Rocque that there was a dispute on it, about the—

A. About Lytle and Green?

Q. Yes.           A. No, he did not know that.

[272]

Q. Didn't you have these letters back and forth?

A. I haven't seen any letters that show any dispute as to Lytle and Green. It is all Okes Construction. This policy was written against a firm bid in competition with three or four other people. There was nothing to talk about.

Mr. Sager: I move that be stricken because it was not responsive.

(Testimony of I. C. Rowland.)

The Court: Oh, it may stand.

Q. Did you have a copy of this letter from Mr. LaRocque?

Mr. Peterson: What is the date of the letter?

A. The letter is December the 16th, 1942.

Mr. Peterson: I think that is immaterial. That was after the cancellation, Your Honor, and this thing was completed.

The Court: He may answer, objection will be overruled.

A. I can't tell you whether I have a copy of that letter or not. It does not show that a copy was sent to me.

Q. Do you remember ever seeing a copy of it?

A. No, I don't know.

Q. Will you examine the next letter under it and tell me whether you received a copy of that?

A. This letter does nothing but say "We discounted our premium 50 per cent from the usual manual premium".

Q. The letter will speak for itself. I was just asking if you had a copy of it.

A. You ask if I have a copy of this?

Q. Yes.

A. I can't tell you. It does not show any copy of it. [273]

Q. Now, Mr. Howland, did you make or have any of your men make oral requests for payment before you sent the bill in October?

A. You mean, that was the sixteen thousand dollar bill?

(Testimony of I. C. Rowland.)

Q. That is right.

A. Well, we had sent them in statements every month, ever since the policy was written requesting payment of the deposit premium, and then when we ascertained the developed premium we made requests each month for that.

Q. And did you make any oral request?

A. Whenever there was anybody in Sioux City from the office, that is one of the things they were supposed to do.

Q. What did they report back to you?

A. I don't recall any report. It would not be necessary for them to make any specific report.

Q. Did they report to you each time it would be forthcoming promptly?

A. I say, I can't recall what reports they made.

Q. From the time—from September 1st when the policy was cancelled until this letter of January, you made repeated requests for payment?

A. They received a statement and invoice and request for payment each month.

Q. And you made several oral requests also?

A. I think so.

Q. You say there never was ever any explanation as to why it was not paid, except it would be forthcoming?

A. I can't recall what any of these men reported back, because an account as much as that, involving that much money, you assume you are going to get your money. [274]

(Testimony of I. C. Rowland.)

Q. Didn't you know, as a matter of fact, during that time the reason it was not paid was because they were negotiating with your home office?

A. I can't agree with that.

Q. What is that?

A. I can't agree with that.

Q. Didn't you know that was the fact?

A. Not on this Lytle and Green account.

Q. Was there any other explanation why it was not paid for a period of four months?

A. No.

Q. And yet you were billing them?

A. We were billing them constantly, and that is nothing unusual in the handling of our business with these large accounts.

Q. No explanation all that time as to why it was not being paid?

A. Other than it would be forthcoming.

Q. That was the response each time?

A. They never raised any question about rates to us—Lytle and Green never criticised the rates. They were happy it was a very substantial reduction over what they previously had been paying. I bid on it, and I gave them a good rate, and a good cover, and they were satisfied with it as the correspondence shows.

Q. And I understand that you were unaware of negotiations during this period of time between Mr. La Rocque and Northrup?

A. As to the rate on Lytle and Green. There were negotiations all the time on the other. [275]

Q. Didn't Mr. Northrup in this meeting in



(Testimony of I. C. Rowland.)

Washington tell you they would not pay that premium?

A. He told me so many thinks I couldn't keep track of them.

Q. You would not say he did not say that?

A. I would not make a statement like that.

Mr. Sager: That is all.

### Redirect Examination

By Mr. Peterson:

Q. Mr. Rowland, on this so-called army plan or comprehensive coverage we have been talking about here, was there any occasion for calling for bids?

A. No, there was no reason for calling for bids. It plainly states—that is the cost plus plan you mean, you call the army—

Q. At least, they converted it, the United States business, into a cost plus business with this war situation, is that the situation?

A. In a measure, yes.

Q. And the amount the carrier, or the insurance carrier received was what, a fixed fee or a fixed percentage?

A. Oh, it is all worked out on a schedule. They allow an insurance—

Q. I don't want to go into the details, but in its final analysis it is what?

A. It is a fixed fee, in measure.

Q. You get a fixed fee, and the fee, is it fixed so that one company can't bid four cents and another seven, or something else?

(Testimony of I. C. Rowland.)

A. No, you can adopt a certain base rate for policy-writing [276] purposes, but those rates are all pretty generally set.

Q. Anybody takes that, they take it on the same basis? A. On that plan, yes.

Q. Yes.

Mr. Peterson: Now, while we are on this matter, Counsel, the Court might have been misled about this fifty per cent proposition. I want to read this letter while it is fresh here, this letter is addressed to Northrup on December 16th, 1942, by Mr. La Rocque:

"Lytle and Green Construction Company, et al., Alcan Highway.

"Under date of November 24th, I wrote you complying with your request for a breakdown of the manual premiums that would normally have applied for the exposures of this risk at the time we carried it, and the premium actually developed under our over all average rate for the comprehensive policy, which included automobiles, our premium was less than 40 per cent of the developed manual premium on the same exposures. In other words, we discounted our rates considerably more than 50 per cent so that our charge of 85 per cent per \$100.00 or pay roll does not seem at all out of line. We would appreciate your comments. We are anxious to get our earned premium settled out by the end of the year if possible."

Now, that is the letter.

(Testimony of I. C. Rowland.)

Q. Mr. Rowland, in making this insurance did you deal with anybody other than Mr. Rice.

A. No.

Q. And in making—sending your bills, did you look to anybody [277] but Lytle and Company and Green Company to pay the bill? A. No.

Q. If they don't pay it you understand you are out? A. That is right.

Mr. Peterson: That is all.

### Recross Examination

By Mr. Sager:

Q. You did negotiate with Mr. Northrup on at least three occasions?

Mr. Peterson: He has gone over that at least twice.

Court Court: I think so.

(Witness Excused)

Mr. Peterson: Before I lose this, I want to introduce it. It is the termination,—may it take number 11, because that is one that was withdrawn.

The Court: It may be admitted.

Mr. Peterson: And it is agreed that a copy there from Lytle and Green may go in, Mr. Sager?

Mr. Sager: Yes.

(Whereupon, correspondence referred to was then received in evidence and marked Plaintiff's Exhibit No. 11.)

## PLAINTIFF'S EXHIBIT No. 11

August 31, 1942.

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

We, having placed our insurance in connection with our work on the Alaska Highway from Slana, Alaska to Canadian Line, with another insurance company whose policy is effective at 12:01 a.m., September 1, 1942, do by this letter request and direct that you cancel as of midnight, August 31, 1942, your policy No. CLP 1750, which was effective on June 17, 1942, at 12:01 a.m., and as to accidents or occurrences happening after midnight, August 31, 1942, we understand that there shall be and there is no liability whatsoever under said policy No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

C. F. LYTLE & GREEN  
CONSTR. CO.

By GEORGE ROACH  
Attorney in Fact.

August 31, 1942.

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
Tacoma, Washington.

Gentlemen:

Re: Phoenix Indemnity Company Comprehensive Liability Policy No. CLP 1750.

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Yours very truly,  
(Sgd.) IRA VAN BUSKIRK

August 31, 1942.

Phoenix Indemnity Company,  
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General Agents,  
201 Washington Building,  
Tacoma, Washington.

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Yours very truly,

SEARS CONSTRUCTION CO.

(Sgd.) LEO L. LAWTON,

Gen. Supt.

Letterhead of

C. F. Lytle Company and Green Construction Co.  
Gulkana, Alaska  
November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
Tacoma, Washington.

Gentlemen:

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Yours very truly,

FRANK EBLEN  
HILDING EKDAHL

cb

Copy sent to Home Office signed:

EBLEN & EKDAHL  
HILDING EKDAHL

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,

Hansen & Rowland, Inc. of Alaska,

General Agents,

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Yours very truly,

V. S. LUNDEEN, INC.

By V. S. LUNDEEN,

Pres.

cb



Letterhead of

C. F. Lytle Company and Green Construction Co.  
Gulkana, Alaska  
November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
Tacoma, Washington.

Gentlemen:

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Yours very truly,

WILLIAM HORRABIN CON-  
TRACTING COMPANY

By A. F. McMAHAN,

Secy.

Iowa City, Iowa.

Request sent to Home Office signed

WILLIAM HORRABIN CON-  
TRACTING COMPANY

W. R. HORRABIN,  
Pres.

Letterhead of

C. F. Lytle Company and Green Construction Co.  
Gulkana, Alaska  
November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
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201 Washington Building,  
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No. CLP 1750 of the Phoenix Indemnity Company dated 12:01 a.m., June 17, 1942.

Yours very truly,

WESTERN ENGINEERING CO.

By R. A. FINLEY

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.  
Gulkana, Alaska  
November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
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No. CLP 1750 of the Phoenix Indemnity Company  
dated 12:01 a.m., June 17, 1942.

Yours very truly,

L. PETERSON

Contractor

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
General Agents,  
201 Washington Building,  
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No. CLP 1750 of the Phoenix Indemnity Company  
dated 12:01 a.m., June 17, 1942.

Yours very truly,  
WELDEN BROS  
E. WELDEN,  
Partner

cb

Letterhead of  
C. F. Lytle Company and Green Construction Co.  
Gulkana, Alaska  
November 18, 1942

Phoenix Indemnity Company,  
Hansen & Rowland, Inc. of Alaska,  
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No. CLP 1750 of the Phoenix Indemnity Company  
dated 12:01 a.m., June 17, 1942.

Yours very truly,

DUVALL & MCKINNEY

DUVALL & McKINNEY

By K. DUVALL

Partner

Copy sent to Home Office signed:

DUVALL & McKINNEY

By HARRY R. McKINNEY

Co-Partner

cb

Letterhead of

C. F. Lytle Company and Green Construction Co.

Gulkana, Alaska

November 18, 1942

Phoenix Indemnity Company,

Hansen & Rowland, Inc. of Alaska,

General Agents,

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Yours very truly,  
J. LEO HOAK

cb

---

The Court: Now, we will take an intermission until 2:00 o'clock this afternoon.

(Recess) [278]

2:00 O'Clock P. M.

Mr. Peterson: Will you resume the stand, please, Mr. Rowland?

---

I. C. ROWLAND

resumed the stand for further examination and testified as follows:

Mr. Peterson: Are you through?

Mr. Sager: I had one question I reserved.

Mr. Peterson: We have interrogatories to read. I thought he might be able to—he didn't have an opportunity to take them with him.

Redirect Examination

By Mr. Sager:

Q. Did you have an opportunity to check?

A. I couldn't find anything in that file.

(Testimony of I. C. Rowland.)

Q. What did you say, Mr. Rowland?

A. I haven't been able to find any of those letters in those files, yet.

Q. Any of the originals?

A. No. There are some other letters that Mr. Peterson has that I didn't have at noon time.

Mr. Sager: You have to make some further examination?

A. I have to check those he has here.

Mr. Sager: Pardon, then we will let that go.

The Court: I wanted to ask Mr. Rowland another question or two. Will you let me see Plaintiff's Exhibits? [279]

Now, Mr. Rowland, did you introduce, or your counsel did in your behalf, certain exhibits here which were apparently intermediate reports concerning pay roll. One of them is Exhibit 6, which Exhibit you will notice (handing Exhibit to witness), and another, 9, and both seem to cover the same period of time. One appears to be a copy.

A. A copy of the other, yes.

The Court: It was made in your office, apparently, and then certified?

A. No, these were both made by the contractors.

The Court: It appears to have been made on your letterhead?

A. Well, these are forms that we had. These are forms that we printed and supplied the contractor with, for the purpose of making these monthly declarations.



(Testimony of I. C. Rowland.)

The Court: But, they are duplicates of one another, covering periods from July 16th to July 31st?

A. Yes, sir, these cover the same period.

Mr. Peterson: I think they were furnished in duplicate by Lytle and Green. We will ask to withdraw one of them. We do not desire to duplicate.

The Court: They are both apparently certified by Lytle and Green, and one though, is on the letter-head of Lytle and Green, is it not, the first one, if you will turn the page?

A. No, that is just the letter transmitting it.

The Court: But, it is Lytle and Green that made [280] the transmittal?

A. Yes, Lytle and Green transmitted it to us.

The Court: It is now then 7—Exhibit 7—8, evidently a similar document for a different period of time. That is from August 1st to August 15th.

A. Yes, sir.

The Court: And then, 8 is the Seattle pay roll of Lytle and Green covering the whole period of time from June 17th to August 31st?

A. Yes, sir.

The Court: Now, where are the similar proofs in reference to the other periods of time that you contend here you are entitled to a premium on, that is, from August 15th to August 31st and from June 17th to July 16th?

A. Mr. Peterson must have them.

The Court: Do you have similar documents?

A. Yes, sir, we have them for the whole period.

The Court: In checking these exhibits here—

(Testimony of I. C. Rowland.)

Mr. Peterson: Your Honor, may I suggest this——

The Witness: Oh, that is the one that was given to us for the first period.

Mr. Peterson: By the P.R.A.?

The Court: That is Plaintiff's 10, I think.

A. That covers the first period, you see, up to July the 15th. It is marked at the top there.

The Court: But, it does not show a calculation of any particular sum that is approved by virtue of that pay roll?

A. No. [281].

The Court: Well, then, where is the pay roll upon which you relied that covers from August 15th to August 31st?

Mr. Peterson: I did not introduce that, Your Honor. We have it.

The Court: Then, did you have a document similar to Exhibit 10 that covered each of these exhibits that have been referred to, 9, and 7, and 8?

A. I believe we did, but I have to check to see.

The Court: Well, that is all. That is what I wanted to get, that cleared up and I have nothing that I have been able to find in these exhibits that covered the period from July 15th to August 31st.

Mr. Peterson: I think, Your Honor, that was covered in the request for admissions, was it not?

Mr. Sager: It is my recollection that your request for admissions covered the entire period.

Mr. Peterson: Yes.

(Testimony of I. C. Rowland.)

Mr. Sager: And I assumed when you were putting in these exhibits—I did not check them too carefully, I presumed you were covering the same ones that were covered in your requested admissions.

Mr. Peterson: Yes, there is a photostat of it.

The Court: That is the period from——

Mr. Peterson: From July.

Mr. Sager: From 8-16 to 8-31.

The Court: No, August 16th to August 31st.

Mr. Peterson: August 31st, '42.

The Court: That is the one I don't seem to [282] find. No. 7 covers August 1st to August 15th.

The Witness: August 7th is this one, that is from July—August 1st to August 15th, yes.

Mr. Peterson: Your Honor, if I may have an opportunity I am sure I have it. I will examine my file which can be introduced later, unless the Court wishes it now.

The Court: I think it should be introduced before the case is closed, so that it may be given consideration together with the others.

Mr. Peterson: Any objection to introducing the photostat?

Mr. Sager: No.

The Court: Exhibit 10 has no calculation at all.

Mr. Peterson: It is on the back, Your Honor. I think you will find it on the last page. Am I correct in that?

The Court: No.

Mr. Sager: You have to turn the whole exhibit

(Testimony of I. C. Rowland.)

right over, Your Honor, and I think you will find it, the penciled notation of the total.

The Court: \$309,821.42 is the pay roll, and that covers the period to July 16th.

Mr. Sager: Including the 15th, yes.

The Court: Including the 15th. Very well.

Mr. Peterson: May I introduce it at this time, a photostat copy of the one which is missing, with the understanding I may substitute the original for it if I can find it? [283]

The Court: Any objection, Mr. Sager?

Mr. Sager: No, Your Honor.

The Court: What number?

The Clerk: Number 17.

Mr. Peterson: It is understood it is introduced?

The Court: Yes, it will be admitted in evidence.

Whereupon, photostat referred to was then received in evidence and marked Plaintiff's Exhibit No. 17.)

(Testimony of I. C. Rowland.)

## PLAINTIFF'S EXHIBIT No. 17

Hansen & Rowland, Inc., of Alaska  
201 Washington Building, Tacoma, Washington

Phoenix Indemnity Company Policy No. CLP-1750

## STATEMENT OF EXPENDITURE OF WAGES

The Undersigned hereby certifies that the following is a true and complete statement of all salaries, wages, sums paid for regular time, overtime, piece work, and all allowanees, and also the cash equivalent of all board, lodging, merchandise, store certificates, credits, and any other substitutes for cash, earned by all persons engaged in all operations in Alaska and elsewhere in connection with the construction of 155 miles of Alaska Highway between Slana, Alaska and Canadian Border employed by the following:

C. F. Lytle Company

Green Construction Co.

and/or .....	\$ 10,666.76*	\$ 333.33
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Frank & Orville Eblen .....	13,710.16	212.08
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Ira Van Buskirk .....	13,758.98	607.28
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Gus Osterman .....	14,155.83	172.72
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E. M. Dusenber, Inc. ....	25,928.94	109.90
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Sears Construction Co. ....	14,118.86	214.00
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J. W. Shothorn Construction .....	13,439.07	503.85
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Frank Eblen & Hilding Ekdahl.....	11,109.45	100.00
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V. L. Lundeen, Inc. ....	12,170.35	
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Wm. Harrabin Contracting Co.....	13,859.50	100.00
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Western Engineering Co. ....	17,335.93	291.18
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L. Peterson .....	11,697.15	
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Weldon Brothers .....	19,145.88	155.47
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Duvall & McKinney .....	21,307.50	302.57
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J. Leo Hoak .....	31,212.18	605.96
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Others (List below)

\$243,616.54	\$3,708.34**
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3,708.34
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Gross payrolls this period.....	\$247,324.88
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\* Does not include payroll for employees in Lytle & Green office, Seattle, Washington.

\*\* Adjustment and supplementary payrolls covering periods from July 15th, 1942 to August 31st, 1942 inclusive.

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 17—(Continued)

Payroll Period 8-16-42 to 8-31-42 inclusive.

Previous total .....	\$491,416.82
Total this period .....	247,324.88
<hr/>	
Total to date .....	\$738,741.70
	.85
<hr/>	
Premium to date .....	\$ 6,279.50
Less previous premium .....	4,177.04
<hr/>	
Premium this period .....	\$ 2,102.26
<hr/>	
Total Remuneration .....	\$247,324.88
Rate .85c	
Earned Premium .....	\$ 2,102.26
<hr/>	

C. F. LYTLE COMPANY &/or  
GREEN CONSTRUCTION CO.By .....  
Title Asst. Office Manager.

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 17—(Continued)

## STATEMENT OF EXPENDITURE OF WAGES No. 3

D.O. No.	Contractor	Pay Period	Gross	Board & Room	Net
	Totals f'wd. from Statement No. 2		\$491,416.82	\$55,286.00	\$436,130.82
43	Sears Construction Co.	8-16 to 8-26 Adj.	\$ 187.00	15.50	171.50
43	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-25 Adj.	83.33	15.00	68.33
46	Ira Van Buskirk	8-16 to 8-31 Reg.	13,758.98	1,608.00	12,150.98
47	C. F. Lytle Co. & Green Constr. Co.	do	10,666.76	1,896.00	8,770.76
48	Gus Osterman	do	14,155.83	1,515.00	12,640.83
49	Western Engineering Co.	do	17,335.93	1,926.50	15,409.43
50	Duvall & McKinney	do	21,307.50	2,213.00	19,094.50
51	J. W. Seothorn Construction Co.	do	13,439.07	1,524.00	11,915.07
52	Sears Construction Co.	do	14,118.86	1,521.00	12,597.86
53	Frank Eblen & Orville Eblen	do	13,710.16	1,632.00	12,078.16
54	Welden Bros.	do	19,145.88	1,956.00	17,189.88
55	Wm. Horrabin Contracting Co.	do	13,859.50	1,632.00	12,227.50
56	J. Leo Hoak	do	31,212.18	3,718.50	27,493.68
57	Frank Eblen & Hilding Ekdahl	do	11,109.45	1,275.00	9,834.45
58	V. L. Lundeen, Inc.	do	12,170.35	1,341.00	10,829.35
59	L. Peterson	do	11,697.15	1,248.00	10,449.15
60	E. M. Duesenberg, Inc.	do	12,873.63	1,518.00	11,355.63

(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 17—(Continued)

## Statement of Expenditure of Wages No. 3—(Continued)

D.O. Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
62	E. M. Duesenberg, Inc.	8-16 to 8-31 Reg.	13,055.31	1,516.50	11,538.81
116	J. Leo Hoak	7-16 to 7-31 Adj.	30.40		30.40
116	Duvall & McKinney	7-16 to 7-31 Adj.	8.80		8.80
116	Wm. Horrabin Contracting Co.	7-16 to 7-31 Adj.	87.50	15.00	72.50
116	Ira Van Buskirk	7-16 to 7-31 Adj.	8.50		8.50
116	Sears Construction Co.	7-16 to 7-31 Adj.	27.00		27.00
116	Frank Eblen & Hilding Ekdahl	7-16 to 7-31 Adj.	100.00	24.00	76.00
117	Duvall & McKinney	8- 1 to 8-15 Adj.	66.70		66.70
117	E. M. Duesenberg, Inc.	8- 1 to 8-15 Adj.	28.83		28.83
118	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-31 Adj.	200.00	24.00	176.00
118	J. Leo Hoak	8-16 to 8-31 Adj.	19.80		19.80
118	Ira Van Buskirk	8-16 to 8-31 Adj.	6.75		6.75
118	Western Engineering Co.	8-16 to 8-31 Adj.	9.65		9.65
128	J. Leo Hoak	7- 1 to 7-15 Adj.	158.26	16.50	141.76
131	Ira Van Buskirk	7-15 to 8-31 Adj.	592.03		592.03
132	J. Leo Hoak	8-16 to 8-31 Adj.	397.50	24.00	373.50
133	Welden Bros.	8- 1 to 8-31 Adj.	155.47		155.47
134	Sears Construction Co.	8- 1 to 8-31 Adj.	.00		.00
135	Western Engineering Co.	8- 1 to 8-31 Adj.	281.53		281.53



(Testimony of I. C. Rowland.)

## Plaintiff's Exhibit No. 17—(Continued)

## Statement of Expenditure of Wages No. 3—(Continued)

D.O. Vo. No.	Contractor	Pay Period	Gross	Board & Room	Net
136	Duvall & McKinney	8- 1 to 8-31 Adj.	227.07		227.07
137	E. M. Duesenberg, Inc.	8- 1 to 8-31 Adj.	81.07		81.07
138	C. F. Lytle Co. & Green Constr. Co.	8-16 to 8-31 Adj.	25.00		25.00
139	Frank Eblen & Orville Eblen	8-16 to 8-31 Adj.	212.08		212.08
140	Wm. Horrabin Contracting Co.	8-16 to 8-31 Adj.	12.50		12.50
151	C. F. Lytle Co. & Green Constr. Co.	8- 1 to 8-31 Adj.	25.00		25.00
151	Gus Osterman	8- 1 to 8-31 Adj.	172.72		172.72
152	J. W. Scothorn Construction Co.	7-15 to 8-31 Adj.	503.85		503.85
Totals as of August 31st, 1942:			<u>\$738,741.70</u>	<u>\$ 83,460.50</u>	<u>\$655,281.20</u>

[Endorsed]: Admitted Sept. 8, 1944

(Testimony of I. C. Rowland.)

Mr. Peterson: Mr. Rowland, just another question.

Redirect Examination

By Mr. Peterson:

Q. You consulted your date book to ascertain the date of your meeting with Mr. Northrup in Washington, D. C.? A. Yes.

Q. During August, or during July?

A. July.

Q. What date was that?

A. July the 11th.

Q. That was on Saturday?

A. On Saturday, yes.

Q. Yes. Now, I ask you whether or not the—or what was discussed between you and Mr. Northrup at that time?

A. The Okes Construction Company.

Q. At that time had you prepared the policy on the Okes Construction Company matter? [284]

A. No.

Q. Now, was there any discussion at all of the Lytle-Green matter? A. No.

Q. Was there anything said at that time about the payment or his refusal to pay the premium, or his telling you he would not pay the premium on that? A. No.

Q. The policy on that was written on July——

A. The latter part of July.

Q. Now, following your discussion what was the nature of this discussion, was it amicable or otherwise, with Mr. Northrup?

(Testimony of I. C. Rowland.)

A. Oh, yes, friendly.

Q. Following that, did you come back and prepare the policy, or have the policy prepared on the Okes Construction Company matter?

A. Yes.

Q. And that was delivered?

A. Delivered to the Okes Construction Company.

Q. I understand, and that closed that incident, so far as policy delivery was concerned?

A. Yes.

Mr. Peterson: I think that is all, Mr. Rowland.

(Witness excused.)

Mr. Peterson: If the Court pleases, I wonder if we may have Mr. Sager's last exhibits, so that Mr. Rowland may examine those. [285]

Mr. Polk, will you resume the stand?

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C. G. POLK,

a witness for the defendants, was recalled for further cross-examination and testified as follows:

Cross Examination

By Mr. Peterson:

Q. Mr. Polk, you knew of the fact, I assume, that this insurance had been provided in accordance with the contract, public liability?

A. I was not very familiar—

Q. Well, you knew of the fact, didn't you?

A. All I knew, there was some insurance. I didn't know any of the details.

(Testimony of C. G. Polk.)

Q. Was there any other insurance other than this on public liability between June 17th and September 1st? A. Not to my knowledge.

Q. No insurance covering this area outside of the 155 miles? A. For Lytle and Green?

Q. By Lytle and Green?

A. Not to my knowledge.

Q. Well, would you have known it had there been?

Mr. Sager: I submit he has answered, Your Honor. He asked whether he would have known. It is not proper.

The Court: I think that perhaps calls for a conclusion.

Mr. Peterson: Well, you may step aside.

(Witness excused.) [286]

Mr. Peterson: Mr. Northrup, will you please resume the stand?

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## H. R. NORTHRUP

resumed the stand for further cross-examination and testified as follows:

### Cross Examination

By Mr. Peterson:

Q. Mr. Northrup, you, in your relations with this matter, finally became familiar with the insurance on this Lytle-Green job? A. Yes, sir.

Q. Yes. I will ask you whether or not there was any other public liability and property dam-

(Testimony of H. R. Northrup.)

age in force, in favor of Lytle and Green between June 17th, 1942, and September 1st, 1942, other than the Phoenix Indemnity policy?

A. Not for Public Roads Administration work.

Q. Well, I don't—will you explain your answer?

A. I say that merely in fairness, so you understand. I understand Lytle and Green have some other operations up there.

Q. I mean, as far as this road is concerned?

A. That is correct, there is no other insurance.

Q. Oh, I misunderstood you. There wasn't any separate policy on this area, outside of the 155 mile proposition?

A. That is correct.

Mr. Peterson: That is all, thank you.

Mr. Sager: No questions.

(Witness excused.) [287]

Mr. Peterson: Now, if the Court please, we desire to offer the interrogatories and answers to the interrogatories of the witness Harvey L. Rice.

Is it agreeable to you, Mr. Sager, if I read it, or Mr. Conley read the answers and you read it, or read the questions and you read the answers?

Mr. Sager: I have no objection to doing the reading, but I object to that being read into the record because they do not constitute evidence. They are a special means of discovery provided by the rules. They are filed as part of the file, but they do not go in as part of the evidence.

I object to their being read into evidence. It is not a deposition in any sense of the word. There is no cross-examination or anything of that sort.

One of the provisions of the rules providing for discovery, they are filed and they are part of the record, but they certainly are not evidence.

Mr. Peterson: I think we are entitled to, where we submit them and their return is sworn to, we are entitled to put them in.

Frankly, Your Honor, now, I don't want to say—I don't know what the rule is on them.

The Court: Well, it is for the purpose of discovery.

Mr. Peterson: They are for the purpose of discovery.

The Court: And then if you discover anything in those answers, you could follow up, of course, by either subpoenaing the person or taking their deposition, [288] but they themselves, the questions and the answers, to them, do not form evidence in the case—do not become evidence in the case.

Mr. Peterson: As I stated, it seems to me if a letter signed by the parties is admissible in evidence, there isn't any cross-examination about that. That likewise an answer to an interrogatory is a declaration or a statement, and is admissible, but frankly I have not investigated the authorities on it.

The Court: I am convinced, Mr. Peterson, that it is the other way, that you cannot have the result of a discovery rise to the dignity of evidence in the case, but if the discovery results in certain things that you desire to make evidence, you can do it by deposition.

Mr. Peterson: I appreciate that.

The Court: Or by offering the documents that

are disclosed. These interrogatories and the answers are in the files.

Mr. Sager: Well, I filed the answers this morning and I assumed Mr. Peterson filed the interrogatories.

The Court: They were considered, yes.

Mr. Peterson: That is the plaintiff's—the plaintiff rests.

Mr. Sager: Excuse me just a moment. We have no further evidence. Well, I am reserving this one question for Mr. Rowland.

The Court: Yes. [289]

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## I. C. ROWLAND

resumed the stand for further cross-examination and testified as follows:

### Cross Examination

By Mr. Sager:

Q. You have examined that exhibit now, Mr. Rowland? A. Yes.

Q. And what is the exhibit number again?

A. Defendant's Exhibit A-5.

Q. Now, it consists of a group of letters and copies of letters? A. Yes.

Q. And my question to you is, did you receive copies of the letters written by Mr. La Rocque contained in that exhibit?

A. I can only find copies to the letters that are marked "cc-Mr. Rowland."

Q. Only those? A. Yes, sir.

Q. Now, with respect to that portion of the

(Testimony of I. C. Rowland.)

exhibit which are carbon copies, did you receive copies of those letters?

A. Well, frankly I haven't checked them all. I can't find them in the file, and I don't want to say I have not received them, because I may have received them.

Q. You know those are the ones I submitted to you a few days ago?

A. Yes, those are, and I checked in Mr. Peterson's office—I got copies of those.

Q. Those are the carbon copies there, then?

[290]

A. Yes, sir.

Q. So the only ones you did not receive copies of are the originals which are not marked carbon copies to you?

A. Yes, that is correct. I can't find any copies.  
(Witness excused.)

The Court: Is there anything further, Mr. Sager?

Mr. Sager: No, we have no further evidence.

The Court: Well, I assume counsel are ready at this time then to proceed with the arguments, and I think that I should state my position so that we can probably shorten the argument or eliminate it. The position of the Court at this time in reference to certain issues here involved, may be stated as follows:

This action was commenced by the plaintiff against the defendant on the theory that it was an account stated.



The defendant moved against the Complaint by seeking further information by way of Bill of Particulars, and upon argument made in support of that motion the contention was advanced by the plaintiff that his Complaint alleged an account stated and therefore was not subject to a Bill of Particulars, which issue was so found. For the purpose of determining whether at that stage of the proceedings it was an action based upon an account stated, the Court proceeded with what might be designated a pre-trial hearing and determined at that time, insofar as it involved the question of [291] supplying information by way of Bill of Particulars, that it was in fact an account stated, and denied the application for a Bill of Particulars.

The defendant then answered in a First Amended Answer, I think it was, with an affirmative defense stating in substance that the matter was still under negotiation at the time the letter was written by the defendants to the plaintiff, upon which the plaintiff rested his claim that he was suing on an account stated, and alleged that further consideration was being had with the federal officials, particularly, I think, the Public Roads Administration.

Then at the commencement of this trial a Second Amended Complaint was filed, carrying the same affirmative matter, and adding a second affirmative defense, alleging that the employees engaged in these undertakings were Civil Service employees, and it was by mistake that the defendant had as-

sumed that they were employees subject to coverage by this contract of insurance.

Now, after a hearing of all the evidence and a consideration of it, I am satisfied that the facts do not support the contention that this is an account stated.

The letter upon which the plaintiff rested its case is somewhat ambiguous, and it indicated that the defendant had not unqualifiedly accepted the statements submitted as his obligation, but there was something further he sought to have done and someone else he looked to for payment, and that someone else, it is quite evident, after hearing the evidence here, was the Federal Government, who made the contract for the construction of this particular [292] section of highway.

The disposition of this case would be a very simple one for the Court if it did not involve certain unusual and novel features, and an unusual and extraordinary situation.

The government apparently is the only one interested in defending against this claim. Actually this Court can not determine the liability of the government under its contract with Lytle and Green, in this sort of a proceeding and in this kind of a contract. The determination of that issue is one that is administrative in its nature and not judicial by the very Act of Congress that made provision for these cost-plus fixed fee contracts, and whether this was an essential item to be taxed as cost is a matter of determination for a governmental agency, in the executive department of government and not here.

However, the United States Attorney at the request and upon the orders of the Department of Justice has seen fit to come into court and present the defense and to all intents and purposes, virtually abandoned the defense and passed the matter over to the government.

I intimated when this situation was first brought to my attention that if the government desired to invoke the jurisdiction of this Court in determining whether under its contract of employment with Lytle and Green there was any liability on its part, and it felt that it could do so, it ought to intervene in the case. I am not sure that is a procedure which is available under the unusual and exceptional situations that have arisen out of the war emergency which brought about this type of contract. But [293] certainly, Congress never intended that the contracting parties dealing with the government should have a *carte blanche* to go out and incur expenses at random and without regard to what it finally adds up to, and then load them back on to the government.

Now in this case there is much evidence that in so far as the defendants in the case were concerned, they assumed the government would pay the insurance premium. They were quite indifferent apparently as to whether this item of expense here involved a thousand dollars or a hundred thousand dollars, and upon the meager basis of a telegram from the Chief of the Public Roads Administration, Mr. MacDonald, which was limited in its language, they entered into this insurance contract that as-

sumed a liability for the term of the contract roughly somewhere between sixty and seventy thousand dollars, and the insurance sought and procured was not submitted to the representatives of the P. R. A. nor any other governmental agency at the time.

The evidence is here and the facts will have to be found, that the actual contract of insurance was not written until about the time of the cancellation.

I do not intend, in making a disposition of this case, to make a finding that shall be binding upon either the government as the party who was having the work done, nor the defendants Lytle and Green and the various unit contractors who undertook to do the work, as to the liabilities between them, because it is quite evidence to me that such determination is one which the administrative department of the government did not want or desire to be made, nor should they in any way be bound by the determina- [294] tion that the Court makes now; as between the parties who have submitted themselves to this Court's jurisdiction—that is, the plaintiff and the defendants.

The defense that has been interposed in this case has been, as I have already indicated, sufficient to indicate to me that there was not an account stated, but it is a defense that before the proper tribunal would be a proper defense, if the government were resisting whatever this cost might be, as an item of construction, and the very indifference, and, I might almost say, recklessness on the

part of defendants in incurring this obligation, is proof of the need for extreme vigilance on the part of the representatives of the government, in seeing that abuses do not arise which are the result of unnecessary added costs of construction, though we must recognize that construction such as is taking place during this war period results in extravagance.

The plaintiff can not be criticised, nor can fault be found with it for trying to go out and get this business. That was its right, and to get it on the best terms that it could for itself.

The defendants, however, should be sure of the position that they take in assuming an obligation of this kind in connection with a cost-plus fixed fee contract, that it is a proper item, and if it is not, the responsibility is personal to them, rather than the responsibility of the government.

Now I say these things because evidently the Department of Justice is defending actions similar to this, involving cost-plus fixed fee contracts and does so upon [295] some theory or some belief that the findings will ultimately be binding upon the administrative agency. They should not be and certainly there is no intent in this case that they should be.

The issue as to whether the employees engaged in this work were Civil Service employees has been raised, and the Court has no hesitancy in making a finding that within the provisions of the Civil service Act they were such. Doubtless the primary reason is the one that was briefly indicated by one

witness this morning—that is, the appropriations for this work at that time provided that none of them shall be expended nor paid to any person who is a member of any subversive group or organization, and in order to meet that requirement by an arrangement where the government is paying checks direct, the Civil Service arrangement came into being. The facts are clear that the employees were recruited almost entirely by the contracting parties with the approval of the government, and when they met the limited tests required here, they were accepted on a Civil Service status, but were, after all, in fact, the employees of the contractors, receiving instructions and orders from them and not being subjected to—if the situation even permitted it—they were not subjected to any orders, directions or instructions from the representatives of the United States Government. I think therefore that the fact they were Civil Service employees does not change the situation as to liability as between the plaintiff and the defendants. It might very properly be interposed as an objection to—or a defense by the government, to permitting these items and charges growing out of this insurance contract [296] to be charged as a cost item, but that is a matter that will have to be settled, as I have already stated, by the appropriate administrative agencies of the government unless there be some means or some manner in which it can be brought to this court.

Now from what I have indicated—and I might add further, that I am satisfied from the facts in

this case that the plaintiff fully expected approval of this insurance contract and expected recognition by the government of the premium liabilities. Certain negotiations were carried on between the plaintiff and representatives of P. R. A. after the difference and difficulties arose, seeking to get P. R. A. approval, but that does not change the situation that the negotiations which brought this insurance contract into being—and the contract itself on its face, without equivocation, is a contract of insurance between the Phoenix Mutual Insurance Company, the assignor of the plaintiff in this case, and the defendants, and I shall therefore hold the defendants liable in such a sum as under their contract of insurance had accrued. And again, I desire to state that this holding shall not in any way be construed or considered as a holding that these were legitimate expenses in connection with the government's contract for the construction of the highway. In other words, I am free from the determination of that question, because it is not before me, excepting inferentially by virtue of the appearances made here, and the evidence offered. The total failure of the real defendants in the case to show any interest in this litigation, evidently proceeding on the assumption that whatever this Court determines is a [297] liability under the issues as here made which will have to be cared for by the federal government, and that is not the intention of the Court, nor should it be. I frankly say if I were determining that issue, my determination would be entirely different than the deter-

mination of the issue between the parties here, because from the statement of the P. R. A. engineers it appears that actual construction work during the interim between June 17th and September 1st was very limited on this contract—or on this highway construction A-1 and A-2. Nevertheless, the contract of employment for construction was in existence and the defendants and their associates had taken scores of men up there and had assumed the responsibility of paying them from the point of recruitment. When they got to Alaska the evidence indicates that some of them were diverted to other jobs. Since I am not in a position now to pass upon the question whether that should be segregated from the work that was actually done in the month of August by these two unit contractors, which amounted to only a small sum—and the defendants have submitted statements against interest binding themselves upon this contract for the full period of time as shown by these exhibits that I have referred to just after the noon intermission, which are specifically:

Exhibit No. 9, covering the period from July 16 to July 31, where they admitted liability of \$2132.16; and

Exhibit 7, covering the period from August 1st to August 15th, where they admit a liability of \$2,044.88; and

Exhibit No. 8, being the Seattle pay roll for the whole period where they admit a liability of approximately [298] \$50.15; and



Exhibit No. 10, where they admit a liability from June 17 to July 15 of \$2632.80; and then

Exhibit 17, covering the last period, from August 16 to August 31, inclusive, where liability is admitted in the sum of \$2,102.26, I shall find that they are liable to the plaintiff in whatever constitutes the aggregate of those sums, and then I think under the provisions of the contract of insurance, there is a further liability that grows out of a cancellation by the assured before the end of the term of the contract. Now what that is I do not know.

Mr. Peterson: That has been computed, Your Honor, by Mr. Tinius, and I think we have agreed, have we not, Mr. Sager, on that matter, that the computation is correct?

Mr. Sager: During the trial it was stipulated that the sixteen thousand dollars—whatever they demanded in their Complaint, is the premium produced by this short rate computation upon the total of one million fifty-five thousand dollars.

The Court: In view of that stipulation the Court will find that the plaintiff is entitled to recover from the defendants, but not from the government, nor from the agency of government that made the contract for the construction of the highway in question, that sum. Formal Findings of Fact and Conclusions of Law may be prepared and submitted, also a Decree.

Mr. Sager: Your Honor does not care for argument? [299]

The Court: I do not think so, Mr. Sager, in view of the fact that—unless there is some particu-

lar feature of what I have said wherein you think I am in error—that is, on the facts themselves, and if you are I will be glad to hear you in that regard.

Mr. Sager: I would like to say briefly, Your Honor, it seems to me that Your Honor is overlooking one matter—I don't know whether it is a question of fact or a question of law. I am not going to argue the question of whether or not these men were government employees or employees of these contractors. I think the evidence is in on that and that is a question for legal interpretation thereafter as to what they constitute.

The Court: No, the Court holds that they were Civil Service employees; that they were given to the contracting parties for the construction of the highway, and I am convinced—I arrive at that conclusion, Mr. Sager, on this ground: I am convinced that if these people, even though they were on the government payroll under this limited Civil Service arrangement, if through their negligence they injured a third person in the course of the performance of this contract, a right of action would have existed against the contractor. Such injured persons would not have been subjected to a claim against the United States Government.

Mr. Sager: Well——

The Court: That is what causes me to arrive at that conclusion.

Mr. Sager: In view of that I would like to make this statement, that the policy provides that the [300] remuneration shall be 85c per hundred dollars

of the remuneration paid to employees of these contractors. Now they either are employees of the contractors within that term "employees", or they are not. They can't be in some middle ground. If they are not employees of the contractors, this premium is not predicated upon that payroll by the very terms of the policy itself. I assume Your Honor has taken into consideration the very familiar rule that an insurance contract is strictly construed in favor of the assured and against the insurer. Now the provision here says "remuneration"—money paid to employees of the contractors. If they are employees of the government, which is our contention here, they are not employees of the assured, and if they are not employees of the assured, then the premium is not to be determined upon the basis of that payroll.

We concede there is some slight actual payroll of insured employees. It is that five or six thousand dollar sum figure shown on one of those exhibits.

Now I don't care to belabor that point further. I want to address myself to this further proposition——

The Court: Mr. Sager, I might for the purpose of satisfying the matter in your mind—I might state to you that the Court is convinced from the evidence in this case disclosing this whole transaction, that the assured, when they made application for this policy and they accepted and assumed the responsibility and obligations thereunder, knew very well the method and procedure under which

they were going to operate, but the insurer had no way of knowing that. [301]

Your argument would be much more persuasive if you were appearing on behalf of the Public Roads Administration, and were resisting this claim.

Mr. Sager: I call your attention to a statement from Mr. Rowland, contained in one of his letters here, which is in evidence,—it is Defendants' Exhibit A-1. It is a letter written by Mr. Rowland on June 27, 1942, addressed to Mr. Northrup. It starts out "Re C. F. Lytle Company and Green Construction, Sioux City, Iowa; Oaks Construction Company, St. Paul, Minn." Then there is a short introductory paragraph, and then it has another reference to C. F. Lytle Co. and Green Construction Company, Sioux City, Iowa, and then some short paragraph under that, and then the reference Oaks Construction Co., St. Paul, Minn. Now in this paragraph is this—or in this letter is this paragraph:

"This constitutes all of the insurance which we have bound up to the present time for either of these contractors, and we have been informed by Messrs. Lytle and Green, and Mr. Marshall and Mr. Morris, that Lytle and Green will not require compensation insurance on their contract, since their employees are all designated as federal employees."

Now this letter was written by Mr. Rowland to Mr. Northrup on June 27, before this policy was

ever actually issued. It was after the binder, but before the policy.

The Court: The policy was not issued until——

Mr. Sager: About July 30th.

The Court: About the time it was cancelled.

[302]

Mr. Sager: They certainly knew the status of these men and the very fact there wasn't compensation insurance—I direct your attention to this, on this Oaks contract, the policy was compensation insurance——

The Court: I appreciate that.

Mr. Sager: There was no compensation insurance on these employees. Why? Because they were government employees, and compensated under the Compensation Commission. This letter recognizes that fact.

The Court: But the government, in connection with the contractors, aided in securing these employees and recruited them and took them to Alaska and put them on the jobs for the very purpose of becoming employees of these contractors. Otherwise, the government would be in a position where it could not have agreed to pay a fixed fee, if it were a government project—a government undertaking, and government employees. The responsibility of each of these employees was first to the contractor, even though he was given a Civil Service status.

Mr. Sager: As I say, Your Honor, I do not want to argue that point too far. I think the evidence is all in here, and if they are government

employees—my only point is that if they are government employees the payroll does not apply. If you hold that they are employees of the contractors within the terms of that provision in the policy why then the payroll does apply.

The Court: The Court holds that they were Civil Service employees, made such only for the convenience of the occasion—that is, in order that the government might disburse public money to the employed of the contractors, and [303] probably for the further consideration that it wanted to save liability and expense that would be incurred by carrying compensation insurance.

You have presented an excellent case if you were defending this action against this item being included as an item of costs in these contracts, but in spite of the fact, Mr. Sager, that you appear here in a sort of a double capacity, yet open and above board in the matter, I can not escape the position I find myself in, which is that I am compelled to make a determination of an issue of fact between two private litigants.

Mr. Sager: There isn't any question about that, Your Honor. We have never questioned the fact of this lawsuit being between Hansen & Rowland and Lytle and Green, and the government, as far as their interest in this lawsuit is concerned, is not before the Court at all, and whatever my capacity is here, I am representing these defendants.

The Court: That is the thing that does trouble the Court, because if the government is not before

it either directly or indirectly, in spirit or materially, and has no interest whatever in the results of this litigation, then Lytle and Green ought to be here, if they have a defense to this action, and the only thing I have from them, the defendants in the case, are their own admissions, in writing as to their liability.

Mr. Sager: Well, now, I want to say a few words, at least on that next point. If—and I am taking now Your Honor's finding there wasn't an account stated, once you wiped out the account stated the burden is then on the plaintiffs to prove the basis for this alleged premium due, this [304] sixteen thousand dollars. Now I will concede that they make a *prima facie* case when they offer the certificate from Mr. LaRocque, showing the total payroll. They are admissions of the defendants and that is the payroll during this whole period of time. From there on, however, there is evidence which is uncontradicted and which I assume serious dispute about, that during the period involved here from June 17 to August 31, that only two of these contractors worked on the sections of the highway, the hundred and fifty-five miles of the highway to which this insurance contract applies.

Now you don't have to consider the government's interests on this phase of this case. Here is a contract between these two parties here in court, a contract prepared by an insurance company with a revised indorsement attached to the insurance policy which if anything, strengthens the rule that it must

be strictly construed in favor of the assured and against the insurer, and it says that the policy applies only to the operations performed at, from, or in connection with the hundred and fifty-five miles from Slana to the Canadian border. There is a sketch in evidence here which shows that hundred and fifty-five miles. The actual work done during this period of time, except for the two contractors, was not done on that section of the highway at all. It was done on an entirely different part, not within the meaning—certainly not any part of the highway within the meaning of the indorsement on the policy. If they are entitled to collect a premium on the payroll on sections 3 and 4, they would be entitled to collect a premium on the payroll of these men associated with these various [305] contractors, wherever they went, because the insurance contract refers specifically to this hundred and fifty-five miles. There are two contractors who worked there—only two during the period involved of the coverage. In addition to that, they are undoubtedly entitled to premiums on the payrolls involved while the men were coming up, because obviously they were coming up there in connection with this particular part of the highway, and they would come within the terms of this insurance policy. But, after they get up there and they go to work on another part of the road—not this hundred and fifty-five miles at all, then certainly that is not payroll attributable to this contract—this premium. The contract itself says only in connection with this hun-



dred and fifty-five miles of highway, and so I think probably the burden shifts to us to overcome the effect of these admissions on the part of the defendants, submitted by the certified payroll records in bi-monthly periods, and it seems to be obviously the evidence here has done so, because it is uncontradicted and little disputed, because there was no employment on those sections of the highway during that period of time.

The Court: Mr. Sager, this insurance is very comprehensive. It uses the term "anything in connection with the contract", and just how far that might be carried I do not know. There is no evidence upon that, except it indicates that they did start to pay employees immediately after they recruited them in Iowa, or Seattle, or from wherever they were taken. They were then selected in connection with this contract. Now, when they got up there they apparently were still employed in connection with the contracts, even [306] though they might have been diverted for a time by the request of the War Department or the request of some other department, but you could very easily overcome the effect of these documents that were admissions on the part of the defendants in a contest as to whether this was an item of cost to be charged against this construction contract, in a cost-plus fixed fee contract. When you try the major issue as to liability for premiums on the insurance contracts and the defendants themselves over their own signatures admit that these employments were in connection

with these construction contracts, it is more than prima facie evidence.

Mr. Sager: Yes.

The Court: So far as the contest between the parties here are concerned.

Mr. Sager: I think, Your Honor,—I don't find anything in this insurance contract which refers to the government's contract. Your Honor indicated that this was in connection with the contract. Now I don't find a thing in the insurance contract which refers back to the government contract, as a contract.

The Court: No, not specifically. It refers——

Mr. Sager: In other words, my position is that you can't bolster or expand or enlarge the provisions of the insurance contract by a reference to the contract between the contractors and the government. In the government contract there is some provision that at the direction of the engineer, he can direct these men to other sections of the highway, but you can't make that a part of this insurance contract, because it is—— [307]

The Court: Mr. Sager, the insurance contract provides that "all operations performed at, from, or in connection with the construction of approximately 155 miles of Alaska highway from Slana, Alaska, to the Canadian Border." That is what it covers.

Mr. Sager: That is right.

The Court: And of course that naturally implies that there must be—must either be or would be,

some sort of an agreement for the construction of such a highway.

Mr. Sager: Oh, but let me ask you this: Suppose these people are up on Section 3-A, a hundred miles distant from these 155 miles that are involved here, and a third party liability occurs, is there any question but the insurance company would say, "Our policy does not cover that. Our policy is restricted to this 155 miles, here, between Slana and the Border", and you way off on another section of the highway, nowhere in that 155 miles? That would be the very first defense the insurance company would set up.

The Court: The Court is not prepared now to say it would be a defense to it.

Mr. Sager: If you can expand that policy to that extent you could spread it over the entire distance of that highway, and I say, certainly the insurance policy does not contemplate that.

The Court: Mr. Sager, do you have any way to explain to the Court at all why Lytle and Green were so completely indifferent, so extremely indifferent in the manner in which they submitted reports at stated periods, asserting the workmen were employed by them, and assuming [308] financial liability?

Mr. Sager: I haven't any information as to what their attitude was before this thing arose. I have had some contact with them since, and frankly I don't think as the Court thinks, they are wholly indifferent. Mr. Rice would have been perfectly willing to come out as a witness. I did not see that he

could have anything that he could add to the government's case. I will say that they thought this policy was a proper policy and they thought it covered what they needed, and until the question of these—who the employees were and whether they were government, or their employees arose, they thought the premium was due. I don't think they have been wholly indifferent.

The Court: How could they have thought they had large numbers of men employed upon the particular stretch of this highway from June 17 to August the 1st, when in fact they did not have any?

Mr. Sager: I don't think they could, and I don't know why they did that, except that I think La-Rocque, who was an office manager, sent down the payroll. He has not even seen the policy but he knows there is a policy written to cover the payroll, and under the policy——

The Court: He certificates they were on this job.

Mr. Sager: Yes, I think that is true.

The Court: I may be in error in the inference drawn from the admitted and proven facts in this case, but I am willing to assume that responsibility, and allow you exceptions to all adverse rulings, and if you will submit Findings, if the parties will, at some stated period of time, and submit a Decree, the Court will consider them and [309] if found in order, sign them.

[Endorsed]: Filed Mar. 15, 1945. [310]

[Endorsed]: No. 11010. United States Circuit Court of Appeals for the Ninth Circuit. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Appellants, vs. Hansen & Rowland, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11010

C. F. LYTLE COMPANY, Inc., a Corporation, and  
GREEN CONSTRUCTION COMPANY, a  
Corporation,

Defendants-Appellants,

vs.

HANSEN & ROWLAND, Inc., a Corporation,  
Appellees.

STATEMENT OF POINTS TO BE RELIED  
UPON

Come now the Defendants and Appellants, by their attorneys, the undersigned, and state that they intend to rely on the following points:

1. The pay rolls upon which the claimed premium was allowed with pay rolls of Government employees rather than employees of the named insured's as provided by the terms of the insurance policy.

2. The policy provides that it "shall be applied only to operations performed at, from, or in connection with all, or any part or division of the contracts of approximately 155 miles of Alaska Highway from Slana, Alaska to the Canadian line."

The premium claimed and allowed by the judgment of the Court was erroneously predicated upon operations of portions of the Alaska Highway outside of and beyond the 155 mile Highway from Slana, Alaska, to Canadian line.

J. CHARLES DENNIS

United States Attorney

.....

Assistant United States  
Attorney

Received copy hereof, this 12th day of March,  
1945.

CHARLES T. PETERSON

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 20, 1945. Paul P.  
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' DESIGNATION OF PARTS  
OF RECORD TO BE PRINTED

Come now the Defendants and Appellants, by their attorneys, the undersigned, and herewith designate to be printed the following portions and parts of the Record on Appeal, which they think necessary for the consideration thereof:

1. Certified copy of record on removal from Superior Court of the State of Washington, to United States District Court for the Western District of Washington.

2. Seconded Amended Answer.

3. Findings of Fact and Conclusions of Law.

4. Judgment.

5. Notice of Appeal.

6. Transcript of Testimony.

7. Statement of Points to be relied upon.

8. Designation of record on appeal.

9. The following exhibits, or designated portions thereof:

Plaintiff's Exhibits 2, 4, 6, 7, 8, 9, 12, 13, 14, 17.

Defendants' Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-10; and the following portions of A-6:

Pages 1, 2, 3, and 4;

Paragraph 5 of Page 5;

Paragraph 1 of Page 6;

Paragraph (h) of Page 7;

Paragraph 3(c) of Page 8; and

Paragraph I(a) of Page 11.

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

Assistant United States  
Attorney

Copy received this 12th day of March, 1945.

CHARLES T. PETERSON

m.e.

Attorney for Plaintiff.

[Endorsed]: Filed Mar. 20, 1945. Paul P.  
O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

RESPONDENTS' DESIGNATION OF ADDI-  
TIONAL PARTS OF RECORD TO BE  
PRINTED

Comes now Plaintiff and Respondent, by the undersigned, their attorney, and hereby and herewith designates to be printed the following additional portions of parts of Record on Appeal, which they deem necessary for the proper consideration of said Appeal:

1. Plaintiff's Exhibit No. 1.
2. Plaintiff's Exhibit No. 3.
3. Plaintiff's Exhibit No. 5.
4. Plaintiff's Exhibit No. 11.
5. Plaintiff's Exhibit No. 15.
6. Defendants' Exhibit No. A-13.
7. Defendants' Exhibit No. A-14.



and the following additional portions of Defendants' Exhibit No. A-6, to-wit:

1. Paragraph 4 of page 5.
2. Paragraph 6 of page 5.
3. Sub-paragraphs (a), (b), (c), (d), (e), and (f) of page 6.
4. Sub-paragraphs (j), (k) and (l), page 7.
5. Paragraphs 3 of page 8.
6. Paragraphs 1 and 2, page 9.
7. Paragraphs 3 and 4, page 10.
8. Paragraph 3 and sub-paragraph (c), page 11.
9. Sub-paragraphs (d) and (h), page 12.
10. Sub-paragraph (c), page 15.
11. Article X, pages 16-17.
12. Article XI, page 17.
13. Article XII, page 17.
14. Section 5, page 18.
15. Sections 4, 5 and 6 of page 1, Equipment Rental Schedule.
16. Paragraph 14 of page 4, Equipment Rental Schedule.
17. Paragraph 17, page 4, Equipment Rental Schedule.

(Note: Equipment Rental Schedule is attached to and made a part of Exhibit No. 6.)

Dated March 21, 1945.

CHARLES T. PETERSON  
Attorney for Plaintiff,  
Respondent.

Due service of copy of foregoing Designation is acknowledged this 21st day of March, A. D., 1945.

J. CHARLES DENNIS

HARRY SAGER

Attorneys for Defendants,  
Appellants.

[Endorsed]: Filed Mar. 26, 1945. Paul P.  
O'Brien, Clerk.

No. 11639

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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HANSEN & ROWLAND, INC., a corporation,  
Appellant,  
vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,  
Appellees.

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Transcript of Record  
IN TWO VOLUMES  
VOLUME II  
Pages 467 to 579

---

Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division



No. 11639

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

---

HANSEN & ROWLAND, INC., a corporation,  
Appellant,  
vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,  
Appellees.

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Transcript of Record

IN TWO VOLUMES

VOLUME II

Pages 467 to 579

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

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Attorneys for Defendants.

In the District Court of the United States, for the  
Western District of Washington, Southern  
Division

No. 556

HANSEN & ROWLAND, Inc., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, Inc., a corporation, and  
GREEN CONSTRUCTION COMPANY, a  
corporation,

Defendants.

### ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for further hearing pursuant to the decision and judgment rendered herein on October 31st, 1945, by the Circuit Court of Appeals of the United States, Ninth Circuit, Plaintiff appearing by Peterson & Duncan, its attorneys, Defendants appearing by J. Charles Dennis, District Attorney for the Western District of Washington, by Harry Sager, Esq., Assistant United States Attorney, and additional evidence was taken on the issues necessary for the entry of a judgment for premiums due plaintiff, in conformity with the views expressed in the decision and judgment of said Circuit Court of Appeals, and the court being fully advised in the premises doth now make the following additional

## FINDINGS OF FACT

In addition to Findings I to XII, both inclusive, made by the court and filed herein on September 22nd, 1944, which the court adopts, the court makes the following additional Findings of Fact and Conclusions of Law pursuant to said mandate of the Circuit Court of Appeals of the Ninth Circuit.

## I.

That the part or portion of the payrolls representing wages or remuneration of workers traveling to Alaska, and in [1\*] unloading and moving equipment to Gulkana, Alaska, in connection with, and for the purpose of performing work on Sections A1 and A2 being the 155 mile limits particularly described in the original contract, and with respect to which the insurance was made, which wages or remuneration was earned prior to the assignment of said workers to sections other than said sections A1 and A2, is the sum of \$202,882.68. That all of said wages or remuneration was earned between the 17th day of June, 1942, the date that said insurance became effective, and August 31st, 1942, the effective date of cancellation of said policy of insurance;

## II.

That between the 17th day of June, 1942 and the 31st day of August, 1942, the unit price contractors, Weldon Bros., and E. M. Deussenberg, Inc., performed work and labor, and together earned a total payroll of \$90,053.81 on said sections A-1 and A-2 of said Alaska Highway. That said work so per-

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\* Page numbering appearing at foot of page of original certified Transcript of Record

formed by said unit contractors Weldon Bros. and E. M. Deussenberg, Inc., was within the protection of the insurance and coverage referred to in paragraph IX of the original Findings of Fact and Conclusions of Law heretofore made by the court and filed herein;

### III.

That between the 17th day of June, 1942, and the 31st day of August, 1942, workmen and employees of Defendants and the various unit contractors named in the insurance policy, Exhibit 4 herein, on which premiums are claimed, performed work and labor on a section of the highway known as Section A-3, between Gulkana and Slana, Alaska, for the purpose of, and necessary to enable workmen and equipment to reach said sections A-1 and A-2, and necessary for the transmission of supplies to said sections A-1 and A-2 of said highway, and without [2] which work and labor said sections could not be reached. That the remuneration earned by employees of plaintiff and of said unit contractors in the performance of said work was and is the sum of \$27,594.00.

### IV.

That by its terms said policy of insurance provided for cancellation by insured on a short-rate basis; that Defendants cancelled said policy of insurance by notice in writing effective September 1st, 1942;

### V.

That the remuneration earned by the employees of Defendants and the employees of the unit contractors named in said policy of insurance between

the effective date of said policy of insurance, June 17th, 1942 and the effective date of cancellation thereof, Sept. 1st, 1942, was and is as follows: Travel time of employees and work in unloading and moving equipment directly connected with the performance of the contract on Sections A-1 and A-2 of said Alaska Highway, \$202,882.68, which remuneration was earned by said employees prior to their assignments to other sections or areas; remuneration earned by employees of Defendants and said unit price contractors named in said policy of insurance between June 17, 1942 and August 31, 1942, necessary for the movement of equipment, employees and transmission of supplies to Sections A-1 and A-2 of said highway, \$27,594.00; remuneration paid by Weldon Bros. and E. M. Densenberg, Inc., to laborers employed directly on Sections A-1 and A-2 during the month of August, 1942, \$90,053.81—total, \$320,530.49. That based on the premium rate on account of earned payroll, or remuneration of the employees of Defendants and associate unit contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and [3] procedure was and is \$4,904.10.

From the foregoing Findings of Fact the court now makes the following:

## CONCLUSIONS OF LAW

### I.

That plaintiff is entitled to have and recover judgment against defendants and each of them in the sum of \$4,904.10, with costs.

Done in Open Court this 4th day of February, 1947.

CHARLES H. LEAVY,  
United States District Judge.

Presented by:

CHARLES T. PETERSON  
Of Counsel for Plaintiffs

(1) Plaintiff excepts to the refusal of the Court to compute the earned premium as respects the unit contractors by using as remuneration 50% of the entire payrolls of said unit contractors between June 17, 1942 and August 31, 1942.

(2) Plaintiff excepts to the refusal of the Court to allow interest from September 2, 1942 (the date of the cancellation of the insurance policy) on the amount found due from Defendants to Plaintiff.

The foregoing exceptions are hereby allowed.

CHARLES H. LEAVY  
United States District Judge.

Defendants except to the foregoing Findings of Fact and Conclusions of Law, which exceptions are hereby allowed.

CHARLES H. LEAVY  
United States District Judge.

Approved as to form:

CHARLES T. PETERSON,  
Attorney for Plaintiff.  
HARRY SAGER,  
Attorney for Defendants.

[Endorsed]: Lodged Jan. 10, 1947.

[Endorsed] Filed Feb. 4, 1947.

In the District Court of the United States, for the  
Western District of Washington, Southern  
Division

No. 556

HANSEN & ROWLAND, Inc., a corporation,  
Plaintiff,

vs.

C. F. LYTLE COMPANY, Inc., a corporation, and  
GREEN CONSTRUCTION COMPANY, a  
corporation,

Defendants.

### JUDGMENT

This cause coming on for further hearing before the court on November 21st, 1946, and having been continued to the 26th day of December, 1946, plaintiff appearing by Peterson & Duncan, its attorneys; defendants appearing by J. Charles Dennis, United States District Attorney for the Western District of Washington, Southern Division, by Harry Sager, Esq., Assistant United States District Attorney, and additional evidence having been taken on the issues necessary for the entry of a final judgment herein in conformity with the views expressed in the decision and judgment and mandate of the United States Circuit Court of Appeals of the Ninth Circuit, and the court being fully advised in the premises, and having made additional Findings of Fact and Conclusions of Law herein, finding all and

singular additional facts pursuant to said decision, judgment and mandate of said Circuit Court of Appeals for the Ninth Circuit, wherein and whereby it found all and singular certain additional facts, and made its Conclusions of Law thereon, which additional Findings of Fact and Conclusions of Law are in writing, and on file herein, it is now, in accordance therewith, [5]

Ordered, Adjudged and Decreed, that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover of and from C. F. Lytle Company, a corporation, of the State of Iowa, and Green Construction Company, a corporation of the State of Iowa, and each of them, the principal sum of \$4,904.10, together with costs in the sum of \$94.00.

Dated: February 4th, 1947.

CHARLES H. LEAVY

United States District Judge.

Presented by:

CHARLES T. PETERSON,

Of Counsel for Plaintiff.

(1) Plaintiff excepts to the refusal of the Court to award judgment based on the earned premium as respects the unit contractors by using as remuneration 50% of the entire payrolls of said unit contractors between June 17, 1942 and August 31, 1942, as provided by the policy of insurance.

(2) Plaintiff excepts to the refusal of the Court to allow interest from September 2, 1942 (the date of the cancellation of the insurance policy) on the amount found due from Defendants to Plaintiff.



The foregoing exceptions are hereby allowed.

CHARLES H. LEAVY,  
United States District Judge.

Defendants except to the foregoing Judgment,  
which exceptions are hereby allowed.

CHARLES H. LEAVY,  
United States District Judge.

Approved as to Form:

CHARLES T. PETERSON,  
Attorney for Plaintiff.

HARRY SAGER,  
Attorney for Defendants.

[Endorsed]: Lodged Jan. 10, 1947.

[Endorsed]: Filed Feb. 4, 1947. [6]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

To: The above-named defendants, C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, and to J. Charles Dennis and Harry Sager, attorneys for defendants:

You and each of you will please take notice that Hansen & Rowland, Inc., a corporation, plaintiff above-named, hereby appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit, from the final judgment of the Court entered

herein on the 4th day of February, 1947, and from each and every part thereof.

JAMES L. CONWAY,

PETERSON & DUNCAN,

Attorneys for Plaintiff.

Copy of the foregoing Notice of Appeal received this 23rd day of April, 1947.

/s/ J. CHARLES DENNIS,

/s/ HARRY SAGER,

Attorneys for Defendants.

Copy of the foregoing Notice of Appeal delivered to the United States Attorney at Tacoma, this 23rd day of April, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed April 23, 1947. [7]

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[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That Hansen & Rowland, Inc., a corporation, as principal, and the Maryland Casualty Company, a corporation organized under the laws of the State of Maryland and authorized to do business in the State of Washington, as surety, are held and firmly

bound unto the C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, in the sum of One Thousand and No/100 Dollars (\$1,000.00) to be paid to the said C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, or their assigns, to which payment well and truly to be made we bind ourselves, our successors or assigns, jointly and severally, by these presents;

Whereas, lately at a District Court of the United States for the Western District of Washington, Southern Division, in an action pending in said Court between Hansen & Rowland, Inc., a corporation, Plaintiff, and C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants, a judgment was rendered in favor of the Plaintiffs, and against the said Defendants, and said Plaintiffs, having filed in this Court a Notice of Appeal to reverse said judgment and said action is now on appeal in the United States Circuit [8] Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of the above obligation is such that if the said Hansen & Rowland, Inc., a corporation, Appellant herein, shall prosecute its appeal to effect and satisfy the payment of costs if the Appeal is dismissed, or judgment affirmed, or such costs as the Appellant Court may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

Dated: This 23rd day of April, 1947.

HANSEN & ROWLAND, INC.,  
a Corporation,

By /s/ CHARLES T. PETERSON,  
Its Attorney.

[Seal] MARYLAND CASUALTY  
COMPANY, a Corporation,

By /s/ F. TUNNARD,  
Its Attorney-in-Fact.

[Endorsed]: Filed April 23, 1947. [9]

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United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11010

C. F. LYTLE COMPANY, INC., a Corporation,  
and GREEN CONSTRUCTION COMPANY,  
a Corporation,

Appellants,

vs.

HANSEN & ROWLAND, INC., a Corporation,  
Appellee.

### STIPULATION AS TO RECORD

Whereas, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision

in the above-entitled cause on October 31, 1945, by which decision the judgment of the lower court was in some respects reversed and the cause remanded to the District Court of the United States for the Western District of Washington, Southern Division, for further proceedings, and

Whereas, a further hearing in said cause was had pursuant to the said opinion and mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and at the conclusion thereof a final judgment was rendered by said District Court of the United States for the Western District of Washington, Southern Division, on February 4, 1947, and Hansen & Rowland, Inc., a corporation, Appellee, in the above-entitled cause, feeling aggrieved at the decision and final judgment of the said District Court of the United States for the Western District of Washington, Southern Division, rendered on the 4th day of February, 1947, has served and filed a Notice of Appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and to the end that said Appeal may be presented and fully considered by the United States Circuit Court of Appeals for the Ninth Circuit, the parties [10] hereto hereby stipulate and agree that the matters and proceedings set forth in the printed Transcript of Record herein, together with certain of the Exhibits referred to therein, are material to a consideration of said Second appeal from said final judgment of said District Court of February 4, 1947, and to the end that said printed Transcript of Record heretofore filed in this cause

may be made a part of the record on said appeal, the parties hereto stipulate and agree that said Transcript of Record, including the Exhibits, made a part thereof and referred to therein, together with a copy of the further proceedings had before the said District Court, resulting in said judgment of February 4, 1947, together with Exhibits introduced therein, may, subject to the approval of this Court, be made a part of the record herein, it is further stipulated and agreed that the making of this stipulation does not foreclose either party hereto from designating portions and parts of the record of the further proceedings herein resulting in the final judgment of February 4, 1947.

Dated this 24th day of April, 1947.

PETERSON & DUNCAN,  
JAMES L. CONLEY,

Attorneys for Appellant.

J. CHAS. DENNIS,  
HARRY SAGER,

Attorneys for Appellee.

[Endorsed]: Filed U.S.D.C. April 28, 1947. [11]

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[Title of Circuit Court of Appeals and Cause.]

### ORDER

It appearing to the Court from the written stipulation of the attorneys of record for the parties hereto, that pursuant to the opinion and mandate of this Court rendered on the 31st day of October,

1945, a further hearing of this cause was had before the District Court of the United States for the Western District of Washington, Southern Division, and that said Court rendered a final judgment pursuant to said further hearing on February 4, 1947, and that Hansen & Rowland, Inc., a corporation, Appellees, above-named, has appealed from said final judgment to this Court, and the parties hereto having agreed that the printed Transcript of Record in this cause, together with the Exhibits set forth and referred to therein, and all proceedings incident thereto are material and proper to be considered on said appeal of Hansen & Rowland, Inc., a corporation, from the final judgment of the District Court of the United States for the Western District of Washington, Southern Division, entered herein on February 4, 1947, the Court doth now order that said printed record, together with exhibits described and referred to therein may be made a part of the record on said Second Appeal.

Dated April 25, 1947.

WILLIAM DENMAN,

United States Circuit Judge.

Presented in behalf of Peterson & Duncan, Attorneys for Hansen & Rowland, Inc.

WENDELL W. DUNCAN.

[Endorsed]: Filed U.S.D.C. April 28, 1947. [12]

In the District Court of the United States, for the  
Western District of Washington, Southern  
Division

No. 556

HANSEN & ROWLAND, INC., a Corporation,  
Plaintiff,

vs.

U. F. LYTLE COMPANY, INC., a Corporation,  
and GREEN CONSTRUCTION COMPANY,  
a Corporation, Defendants.

ORDER DIRECTING THAT ORIGINAL EX-  
HIBITS BE TRANSMITTED WITH REC-  
ORD TO CIRCUIT COURT OF APPEALS

Upon application of Plaintiff, made in open  
Court, the Court does now order that Defendants'  
original Exhibits A-12, A-15 and A-16 may be trans-  
mitted by the Clerk of this Court to the Clerk of  
the Circuit Court of Appeals as part of the record  
herein.

Dated: April 23rd, 1947.

CHARLES H. LEAVY,  
United States District Judge.

Presented by:

PETERSON & DUNCAN and  
W. W. DUNCAN,  
Counsel for Plaintiffs.

Approved: HARRY SAGER,  
J. CHARLES DENNIS,  
Attorneys for Defendants.

[Endorsed]: Filed April 23, 1947. [13]



[Title of District Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the Above-Entitled Court:

Please prepare and certify, as a transcript on Appeal to the United States Circuit Court of Appeals, in the above-entitled cause, as follows:

1. Additional Findings of Fact and Conclusions of Law filed herein on February 4, 1947.
2. Judgment filed herein on February 4, 1947.
3. Notice of Appeal.
4. Bond on Appeal.
5. Stipulation of Parties Regarding Original Record.
6. Order of Circuit Court of Appeals re Original Record.
7. Statement of Points on which Appellant intends to rely on Appeal.
8. Order for Clerk to Transmit Original Exhibits to Circuit Court of Appeals.
9. Designation of Parts of Record to be printed (Appellants).

and transmit the same to the Clerk of the United States Circuit Court of Appeals, at San Francisco, California, together with transcript of testimony herein.

Dated this 28th day of April, 1947.

PETERSON & DUNCAN,  
Attorneys for Appellant.

[Endorsed]: Filed April 28, 1947. [14]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 14, inclusive, together with the original Reporter's Transcript of Proceedings, consisting of pages numbered 1 to 101, inclusive, original Statement of Points on Which Appellant Intends to Rely Upon Appeal, the original Appellant's Designation of Parts of the Record to be Printed in the Circuit Court of Appeals, and Defendants' original exhibits, numbered A-12, A-15 and A-16, comprise a full, true and correct record of so much of the papers, proceedings and records in Cause No. 556, Hansen & Rowland, Inc., a corporation, Plaintiff, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Defendants, as required by Plaintiff's Praecipe for Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Reporter's Transcript of Pro-

ceedings, original Statement of Points upon which Appellant Intends to Rely, original Designation of Parts of the Record to be Printed and Defendants' original Exhibits, Nos. A-12, A-15 and A-16.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee .....	\$5.00
Clerk's fee for preparation of certified	
Transcript of Record on Appeal .....	1.40
	<hr/>
	\$6.40

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, in the city of Tacoma, in the Western District of Washington, this 26th day of May, 1947.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By    E. E. REDMAYNE,  
Deputy.

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[Title of District Court and Cause.]

## TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 21st day of November, 1946, at the hour of 10:00 o'clock a.m., the above-entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above-entitled Court, sitting in the

District Court of the United States at Tacoma, Pierce County, Washington; the plaintiff appearing by its attorney, Charles T. Peterson, and the defendants appearing by Harry Sager, Assistant United States Attorney; both sides having announced they were ready for trial.

Whereupon the following proceedings were had and testimony given, to-wit: [1\*]

The Court: Docket 556, Hansen & Rowland, Inc., vs. C. F. Lytle Company, and others, for disposition of law matters raised by an opinion of the Circuit Court of Appeals.

The Court has read and reread this opinion in this case and from a study of it I come to the conclusion that the position taken by the trial court, in the case that these employees were not civil service employees to that degree or extent to which they would be exempt from liability that was sought to be covered by the insurance contract herein, the lower court was affirmed, and reversed from the finding made that all of these employees, even though they were assigned to other tasks than the construction of the hundred and fifty-five miles of highway covered by the insurance contract, were erroneously included in the payrolls that were subject to insurance premiums, and there is left in the case, then, only the question as stated in the language of the Appellate Court, whether or not the reason be the one suggested, the policy does limit coverage to a

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\* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

specific area, the judgment of the District Court awarding full premium claim must be reversed.

An issue appears to be presented as to whether some part of the section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. That, it would seem to me, leaves [2] the situation one where it could almost be reached by agreement between the parties without the taking of any further testimony. However, if there be a dispute such as would require taking additional testimony to dispose of the issue that the Appellate Court has indicated, I am prepared to either now or at some future date to do that. But the evidence was quite complete, though I haven't had the benefit of the entire transcript of it, but at the time of the trial it is my recollection on that particular issue, with the one exception, and that is whether these employees who were recruited in the Middle West, and immediately went upon the payroll, were or were not all recruited to work on this particular section of highway mentioned by this contract—contract first between the contractors and the government and the coverage obtained by this insurance policy. The Appellate Court seems to leave the inference, at any rate, that the trial court in this re-hearing should determine as a matter of law whether the coverage dated from the recruitment of these employees. I have read a transcript of my oral decision, made at the time the case was disposed of, and therein I thought I made a finding that they would be so covered, and I think defendant's coun-

sel conceded that that should be the situation. I base this last statement upon a quotation [3] from a talk which had occurred between the Court and Mr. Sager, representing the defendant, in which it was said by you, Mr. Sager:

“There are two contractors who worked there—only two during the period involved in the coverage.”

That’s on the one hundred and fifty-five mile stretch of highway.

“In addition to that they are undoubtedly entitled to premiums on the payrolls involved while the men were coming up, because obviously they were coming up there in connection with this particular part of the highway, and they would come within the terms of that insurance policy.”

I am inclined to again find that that was the situation, unless there be a contention that there was a recruitment of employees for some other section of highway.

Now with the statement that I have made, I will be glad to hear from the parties as to what your contentions are. I will hear from you, Mr. Sager, first.

Mr. Peterson: Mr. Polk, your Honor, was the resident engineer up there, and it may be possible with some short examination of Mr. Polk, that his testimony may be of assistance to us in arriving at the facts and particulars that are troubling me in the matter, and if it’s agreeable, I would like to

have Mr. Polk take the stand and [4] interrogate him shortly.

The Court: Well, that may be done, but first I would like to have such comment from counsel representing the parties here as you feel warranted in making with reference to the statement that the Court has just made concerning this matter.

Mr. Sager: Well first, there is first one thing that I think probably your Honor has—I just want to call your Honor's attention to. You say it is your present inclination that the payroll of the men from the time of recruitment until they reached there, should be included. Now the policy—the insurance policy didn't go into effect until June 17th. Most of this recruitment occurred prior to that date, so of course any payroll of the men prior to the opening date of the policy couldn't be included. The policy coverage period was from June 17th to July 31st. Obviously no payroll beyond either of those dates, or outside of that period is attributable to premium.

The Court: Well, I am inclined to agree with you on that.

Mr. Sager: So the date of recruitment wouldn't be important. The date of travel of any of these men from—between June 17th and July 31st may be attributable to the premium base. Now beyond that—and I think at the time, [5] and apparently from what I said at the time of argument in the case, it was my impression then that they should be entitled to pay, or the pay should be included in the premium base while they were going up there, on the theory that—that the Sections A-1 and A-2

were the only ones involved. I think the facts which were not disclosed at that time alter that situation. The facts as I understand them are these, that before any substantial number of men got up into Alaska on this job, the government engineers—Mr. Polk, and some engineer, I think, or someone representing the Lytle & Green Company were there, and after looking over the situation, determined that the work should be done on these other sections of the highway than on the one hundred and fifty-five miles. This occurred probably before the 15th of June. They wired to the head of the Public Roads Administration in Washington asking for authority to divert the men to these other sections of the highway, rather than on the Sections A-1 and A-2, and got that authority approximately the 15th of June, on Section A-3. In about a week or ten days, or two weeks later, they got additional authority to divert the men to Section A-4.

Now its my position, your Honor, that since this was a contract—we're speaking now of the terms of the government's contract, not the insurance contract, but the government's contract, they had a right—the [6] government had a right to designate other portions of the roads in Alaska to be worked upon. If they did that between themselves—that is, the contractor and the government, and other sections were designated upon which the work was to be done, then it is our position that men traveling to Alaska from that time on were not traveling there to work on Sections A-1 and A-2, and that if they were not traveling on Sections A-1 and A-2,



irrespective of what the insurance people thought or knew—as a matter of fact they did not know anything about the contract—the details of it, that then the travel pay of these men is not in connection with the hundred and fifty-five mile work and should not be considered as part of the base for premium.

Now Mr. Polk can testify, I think, to substantially what I have said with respect to the change. Well, further than that, actually when the men did arrive in Alaska, and they arrived over a period of time, a lot of them not reaching there until along in July, but as they arrived they were assigned to other portions of the highway. All of them, even the two contractors who later went to work on sections A-1 and A-2, when they arrived there, were assigned to other parts of the road and did work on other parts of the road, and then subsequently were assigned to Sections A-1 and A-2, so that all of the men up there, under any of the contractors, [7] were assigned to other sections of the road as soon as they arrived.

Now, as I said, Mr. Polk will testify generally concerning those facts. He doesn't have any—he doesn't have the telegraphic authority received from Washington, either the copy that we received, or the copy that was retained in Washington, if one was retained, and he has to depend upon his recollection as to those dates and those facts. It may be we can get them later. We haven't been able to get them. While I learned of these facts about a week or ten days ago, and we haven't been able to get them returned.

Mr. Peterson: If the Court please, it's our contention that until such time as orders or instructions were given to perform service outside the limits of the hundred and fifty-five mile section, that all remuneration earned subsequent to the effective date of the policy, becomes a part of the base for the computation of premiums. For instance, I think it appears from the record that work was begun—actual work was begun on some of these sections on July 2nd, 1942. I have not been advised—I have had several conferences with Mr. Sager, and it is apparently difficult to get any information from the Public Roads Administration from what he tells me, and I have the same [8] difficulty trying to get any information from the defendants. I think it proper, however, to endeavor to narrow these issues just as much as they may be narrowed, so that it will save trouble for everybody, as well as the time of the Court.

In the decision of the Circuit Court of Appeals, the Court says the cause will be remanded for the taking of—or I'll go back:

“The judgment of the District Court awarding full payment must be reversed. An issue appears to be presented as to whether some part of that section of the payroll representing wages of the workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues.” I call your Honor's attention to that “or other issues, as may be necessary for the

entry of a judgment for premiums due in conformity with the views herein expressed.”

Now going back, your Honor, to page 6, does your Honor have a——

The Court: Yes, I have a clip sheet.

Mr. Peterson: Page 6, your Honor.

“The change of plans adding to the blocking off of the A-1 and A-2 sections past the one hundred and fifty-five mile limit caused the principal personnel [9] recruited and the balance, as was testified by the government field engineer to be diverted from this job of construction to the A-4 highway section, farther north and inland toward Fairbanks. Only two of the fourteen associated union contractors with a total payroll of \$90,053.81 of the total payroll of”—a million and so on—“on which the District Court based the policy premium worked on the A-1 and A-2 sections during the coverage period.”

Now, are we to understand that that determination by the Circuit Court of Appeals is to be reopened in any way—the ninety thousand dollar matter?

The Court: Well, I think we are if that—if the calculation is in error there. If its some sum other than the ninety thousand dollars, we are.

Mr. Peterson: Now, the next paragraph, your Honor, I wish to direct your attention to particularly:

“It was testified and not disputed that work

on Section A-4 was not directly a part of the A-1 or A-2 section work, and it plainly appears that it was not done in connection with the construction of the latter section as might have been the case if, for example, it had been done so that A-4 or A-4 might be used for necessary transmission of A-1 and A-2 supplies." [10]

Now, your Honor, the record shows that—the testimony of Mr. Clayton, that substantially everything was shipped to Valdez, about one hundred carloads of equipment and machinery. When Mr. Polk went on to the job he established his headquarters at Golkana and—will you hand me that map? Does your Honor have the printed record before you?

The Court: No, I don't have it here. The map was an exhibit.

Mr. Peterson: I will find it right here so your Honor will have an understanding of the situation. That is a photostatic reproduction, your Honor, of the exhibit which was introduced in evidence. Now the—all equipment and supplies were shipped, or substantially all, were shipped to Valdez.

Your Honor, I have indicated on the map before you in red pencil, Valdez and Golkana. Golkana is the postoffice indicated on the map, found in the record. Now it is my understanding, your Honor, that this equipment was taken in overland to Golkana, and then what has been referred to, I think in the record, as the Trail Road, was built on what is marked as the A-3 section there, the fifty miles, I

think it is, to Salana. Salana does not appear on the map that you have before you, your Honor, but it does appear in the printed record, and then a trail road was built in [11] from Salana, or from Golkana to Salana, where the work was begun, and that road was necessary, had to be built, to take in the machinery and equipment and supplies to Golkana to the one hundred and fifty-five mile limit, and thereafter all supplies, equipment, and employees were taken in to Golkana to the one hundred and fifty-five mile limit over the so-called A-3. I think the evidence will show a small airfield was established at Golkana, and all these employees were taken in—practically all of them—at least a great number, by plane, landed at Golkana and then transported over the so-called trail road to the one hundred and fifty-five mile limit.

Now, it is our contention under this language of the Circuit Court of Appeals, if, for example, it had been used, that is the section outside the one hundred and fifty-five mile limit, it might, as had been done, so that they could be used for the necessary transportation of the A-1 and A-2 supplies, then the remuneration incident to putting in that road so as to reach the one hundred and fifty-five mile limit, is properly included in the base for premium computation. We think that that necessarily follows the language of this opinion, and that therefore, in the further consideration of this case by your Honor, some evidence should be introduced with respect to that matter [12] and after that is done, and if your Honor concludes that our conten-

tion is proper in that respect, we will have the names of the contractors who worked on this so-called Trail Road to reach Salana, and that would strictly be a matter of computation from there on. I agree that this matter is largely one of computation, but that it will be necessary in this connection to have some evidence——

The Court: Mr. Peterson, it isn't your contention that any of the work done on Section 4 was done because it was essential to construct that first in order to reach that——

Mr. Peterson: My information, your Honor, so far is, that it was not, but my information very definitely is that Golkana was the convenient and feasible assembly point for men, material, and equipment, and it was necessary to construct this so-called Trail Road as it has been described to me, to reach Salana, and which is in the one hundred and fifty-five mile section. I doubt if anything on 4 had anything to do with sections 1 and 2, although I am not—I don't like to make a statement at this time regarding that.

The Court: Well, the paragraph of the opinion that you read refers to Section 4.

Mr. Peterson: Yes, it refers to section 4, but if your Honor will recall that when this case was tried before [13] your Honor, the pleadings were not finally recast until the afternoon of the first day of the trial, and it seems to me that if the ninety thousand dollar item referred to by the Circuit Court of Appeals is to be opened up in this inquiry, that then by the same token the question as to

whether or not A-4 was actually used for the purpose of transmission of equipment and supplies may also be properly opened up, although as I understand the situation at this time, no such use was made of 4, and upon developing that and getting definite information on that matter—we are definitely advised it was not used, we would not pursue the question any further with respect to 4.

The Court: Well, you may proceed and make your record and further proof on this item that you mentioned.

Mr. Sager: Of course, your Honor, we do not think there is any question as far as the ninety thousand dollars is concerned. It seems to us the Court has decided that very clearly. The only thing left for further decision is this question of travel time on the way up to the job.

Now following the paragraph Mr. Peterson read—

The Court: I am familiar with it.

Mr. Sager: The Court says:

“Thus work done outside the specified sections of road was therefore not within the policy, and the general payrolls covering work done elsewhere cannot [14] properly be used as a part of the premium base.”

It seems to me that clearly restricts, as far as the actual work on any part of these sections A-1 and 2. That matter had all been up before this Court and before the Circuit Court.

Mr. Peterson: I think that language is qualified by——

The Court: You may proceed with such evidence as you desire to offer.

Mr. Peterson: Now, your Honor, we haven't—we desire—my view and understanding of the matter is that we would have an understanding as to just what the issues would be, and then we would confine our evidence to those issues. We are not prepared to go through all this——

The Court: Mr. Peterson, I am satisfied from a reading and a rereading of this opinion of the Circuit Court, that the issue is, as stated in the opinion, as to what work was done upon the section of road that we have been referring to as A-1 and A-2, or the hundred and fifty-five miles, and not any work done upon any other section of the road, or any of the other contracts that the parties might have had with the government for the construction of roads. My recollection of the testimony was that the diversion grew out of the necessities of war, and when the original [15] contract was entered into between the government and the contractors, and likewise the contract of insurance entered into between the contractors and the insurance company, that they then contemplated continuous construction of the hundred and fifty-five miles of highway, but the war situation was such that they diverted part of those workmen, or nearly all of them to the other sections, referred to in the records, I think, as Sections 3 and 4.

Mr. Peterson: It seems to me the correct interpretation of this decision is that any work, outside of the hundred and fifty-five mile limit necessary



to be done for the transmission of A-1 and A-2 supplies and equipment is properly included in the premium base. It doesn't seem to me there is any escape from that, in view of the language of the Circuit Court of Appeals, on page 6.

The Court: I am unable to agree with you in that regard.

Mr. Peterson: However, we desire, your Honor, to make a record on it.

The Court: Yes, you may. Do you desire to do that now?

Mr. Peterson: No, your Honor. It will be necessary to take a deposition on that matter. And then from there on it will simply be a matter of computation. [16]

The Court: Well, I think I'll let you make your offer of proof, and I think if your offer is accepted, then the deposition would be in order. If it is denied, why you can just save your exception on that.

Mr. Peterson: Your Honor, right at the moment my information is not sufficient. I don't want to make—I wouldn't like to make an offer of proof, unless—without having all the information, in making an absolutely correct statements of the facts, which I intend to prove. I desire a further conference with Mr. Rice and Mr. Crowley, the manager up there. I could then submit the offer of proof in form of a writing, submitting a copy to Mr. Sager. I'm hardly prepared, your Honor, to make an offer of proof to the Court at this time and represent that its absolutely correct. I haven't sufficient information.

The Court: Well, do you have some testimony that you desire to put on now, either party? I would like to have you do so if you have a witness here who is familiar with phases of this contract—he may be called.

Mr. Sager: I want to put on some testimony, Your Honor, not in connection with this matter Mr. Peterson is talking about, but I suggest, Your Honor——

The Court: Very well. I take the position I do now because the Circuit Court in making a disposition of [17] this case, it appears to me, decided it independent of the inference that is drawn now from the paragraph that has been quoted, and that the language therein contained is not at all essential to a decision of the case.

Mr. Peterson: Will Your Honor leave the matter open so I may submit a written offer of proof?

The Court: Yes, I'll do that, but then I do not want this witness to have to be brought back here unnecessarily for a further hearing.

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### CLIFFORD G. POLK

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

#### Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. Clifford G. Polk.

Q. And what's your present occupation?

(Testimony of Clifford G. Polk.)

A. I am a highway engineer in the Public Roads Administration.

Q. You testified with reference—at the previous trial in this case? A. Yes.

Q. What duties if any did you have in connection with the contract between the Government and Lytle & Green Construction Company?

A. Well I was the resident engineer for the Government on this contract.

Q. And did you go to Alaska in connection with that work? A. I did.

Q. When did you arrive in Alaska?

A. I think it was May 25th.

Q. Now at that time, who else was up there in connection with the contract? You say May 25th. That was for what year? [19]

A. 1942. I don't think there was anyone else there at that time. I believe I was the first one there in connection with that contract.

Q. Were there any Lytle & Green representatives there at that time?

A. Not on the job. Mr. Green, however, was in Alaska, but he also had other interests up there he was engaged upon primarily.

Q. Well, when did anybody else arrive there in connection with this work?

A. The first contingent arrived about June 18th, thirty to forty men. They flew in from—oh, I beg your pardon. I— they flew in but I don't know where from, whether it was from Edmonton or Seattle.

(Testimony of Clifford G. Polk.)

Q. Do you know what contractor they were employees of?

A. They were mostly a firm called the Western Engineering Company, a bridge firm—a bridge contractor.

Q. Is that one of these unit contractors?

A. Yes.

Q. When did the representatives of Lytle & Green—I mean someone in charge, arrive there?

A. Mr. Crowley the project manager arrived about June 21st or 22nd.

Q. Now when you got up in there, Mr. Polk, did you examine the territory and the roads that were to be worked on under [20] this contract?

A. Yes.

Q. And did you do anything as a result of that preliminary examination?

A. Yes, I immediately wired my immediate superior that it would be impossible to proceed with this one hundred and fifty-five mile construction primarily because the army had us bottlenecked—we couldn't get passed them. About two weeks later, about the 15th of June—maybe as late as the 18th of July, I received a reply——

Mr. Peterson: Now I object to this evidence as not being the best evidence. The reply is the best evidence—the telegram itself.

Q. Do you have that telegram?

A. No, I do not.

Q. Do you know what happened to it?

(Testimony of Clifford G. Polk.)

A. It's in our files somewhere, back in Washington, D. C.

Q. Have you made an effort to get it?

A. I have.

Q. What effort did you make to get it?

A. I caused a telegram to be sent to our Chief in Washington requesting the telegram. Apparently they couldn't find it because it wasn't sent.

Q. Did you get a reply from them?

A. We got a reply—we have a reply. [21]

Q. It didn't include the telegram?

A. It did not. It mentioned it.

Q. What authority did you have from your Chief?

A. I requested that work be done on Sections A-3 and A-4, rather than on——

Mr. Peterson: Now, just a minute. We object to that. The telegram is the best evidence, and he hasn't——

The Court: If the telegram isn't obtainable, Mr. Peterson, why I will allow secondary evidence.

Mr. Peterson: Your Honor, I submit he hasn't sufficiently accounted for not producing it.

The Court: The objection will be overruled, and an exception allowed. Proceed.

Q. Were you granted that authority?

A. We were first granted authority to work on Section A-3, as well as to improve the Richardson Highway, over which we had to bring our supplies.

The Court: Was the Richardson Highway A-4?

The Witness: No, it is not, Your Honor. It is

(Testimony of Clifford G. Polk.)

an existing road connecting Valdez to Gulkana, and on up to Fairbanks.

The Court: Oh, I see.

Q. Now, did you later get authority to work on A-4?

A. Later we received authority to work on A-r, yes, but not [22] on that first telegram. That was the second telegram.

Q. About when did you get these authorities?

A. The first one was sometime between June 15th and June 20th, and the second one was prior to July 1st of that same year, but later than the first one.

Mr. Peterson: Just a moment, I would like to interrogate the witness at this point.

Were those instructions in writing?

The Witness: They were in the nature of a telegram.

Mr. Peterson: Where are the telegrams?

The Witness: I beg your pardon.

Mr. Peterson: Where are the telegrams?

The Witness: As far as I know they are in our files in Washington. It's rather hard to explain, but when we left Alaska the files were all bundled up and shipped to Washington, D. C. I am referring to our own files on the local section in Alaska, and they are in Washington, but no one can find anything they want from those files, apparently.

Mr. Peterson: We object to this oral testimony, Your Honor. This has been our situation in this

(Testimony of Clifford G. Polk.)

case, there has been persistent requests for information regarding this matter, and we've always been sidetracked with excuses. I don't know the reason for it, and I am [23] not assigning any bad motive to anybody, but for some reason or another the disposition on the part of the defendant and the government here, is not to produce anything in writing, and——

The Court: But I understand Mr. Peterson, the witness says he made an effort to get these documents, but due to the method of handling documents, particularly under the stress of war, and the way in which they were sent back they have been unable to locate them, but that has has an independent recollection of them, and I think under such a statement of fact the secondary evidence is not only admissible, but is proper.

Mr. Peterson: We except—or we object on the grounds that no sufficient showing has been made for the admission of parol proof. The telegram is the best evidence.

The Court: Your objection will be noted and overruled. Proceed.

Q. Did you advise Crowley or—Crowley is the name of the man in charge of it?

A. Yes, sir.

Q. Did you advise him of what you were doing in connection with this?

A. Well, these telegrams to my chief were sent before Crowley arrived. The answers—the answer

(Testimony of Clifford G. Polk.)

to the first one was [24] received before Crowley arrived.

The Court: And who was Crowley?

The Witness: He was the project manager for the contractors——

The Court: I see.

The Witness: ——of Lytle & Green.

Q. And by the way, you say you wrote to your chief. Who was that? A. J. S. Bright.

Q. And his—what is his——

A. He was district engineer of the Alaska Highway for the Public Roads Administration.

Q. Now what, then, did you do after receiving these telegraphic authorities, Mr. Polk, in connection with the sections of the highway?

A. Well, we acted upon the authority given us in the telegrams.

Q. Now when did the men begin to arrive,—the actual men under these various contracts?

A. On or about July 1st. From then on.

Q. And as they arrived, were they assigned to work?

A. Yes, they were assigned to work, but, however, no actual construction of the road began until sometime later, because their equipment had not arrived.

Q. Well, what work did they do in the meantime? [25]

A. Erected—started to erect the main camp at Gulkana, and on June 7th they started some work on that section A-3, using just hand tools.



(Testimony of Clifford G. Polk.)

Q. On what date did you say?

A. That was June 7th—July 7, I beg your pardon.

Q. Well, were the men as they arrived assigned to particular portions of the highway, or to particular jobs?

A. The contractors were, yes.

Q. That's what I mean, and did they then work on those——

A. As soon as their equipment arrived, yes.

Q. Now, what—do you have any recollection of what work they were assigned to?

A. Well, I can give the assignment, I believe, of each individual contractor.

Mr. Peterson: Just a minute, may I ask were those assignments made in—by written order in accordance with the original contract?

The Witness: I believe not.

Mr. Peterson: They were not made in writing?

The Witness: Not at that time.

Mr. Peterson: Well——

The Witness: In accordance with the original contract—I don't understand that part of it.

Mr. Sager: I think that is cross-examination, any way. [26]

The Court: I am afraid it is, too.

Mr. Peterson: Well, it may be. I just wanted to know whether or not they were in writing. If they were in writing then the writing is the best evidence.

Q. Well, how did you designate or assign these

(Testimony of Clifford G. Polk.)

men to the various parts of the work up there, Mr. Polk?

A. Well, Lytle & Green were the management contractors and it was their duty to make all such assignments, with our approval, so, it was put up to them to make the assignments, and they worked out a—they worked out the assignments, which were entirely satisfactory to us.

Q. Well, what I am getting at is who actually directed the contractors to certain sections of the highway—certain——

A. Oh, well, as soon as—we were all waiting for those particular—that second telegram authorizing work on A-4, but as soon as those telegrams came in they were taken up with the management contractor, or his representative, and decided orally that we would go to work on those sections.

Q. On what sections?

A. Sections A-3 and A-4. Also this maintenance work on the Richardson Highway.

Q. Now, did any of the men go to work on Sections A-1 and A-2 upon their arrival?

A. No, they didn't, not on their arrival, no.

Q. Well, in the case on trial before, you testified that two of [27] them—two of the contractors were subsequently assigned to A-1 and A-2.

A. That is right, about August 1st of 1942, the two contractors, Dusenbergh Brothers and Weldon Brothers were able to get on to that section, and they did.

Q. And where had they worked prior to that?

(Testimony of Clifford G. Polk.)

A. They—some of them worked at Valdez unloading equipment; some of them worked at Gulkana helping construct the rather large camp we had there; some of them worked on this maintenance work on the Richardson Highway, and some of them were working also on Section A-3.

Q. Now you are speaking of the two contractors?

A. I am speaking of both contractors?

Q. Was that generally true of the other contractors—the other unit contractors?

A. Well, generally. Some of them did not arrive until somewhat later and immediately they went to their assigned jobs, then, I think the contractor called Shothorn, for instance, arrived in Big Delta, Alaska, on about June 13th, and the very following day he started to work on Section A-4, which starts about ten miles from this airport of Big Delta, where they landed.

Mr. Sager: I think you may inquire. [28]

#### Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, you set up your headquarters at Gulkana, is that correct—you set up your headquarters at Gulkana for this job?

A. My own headquarters was not at Gulkana, no.

Q. Well, where were your headquarters?

A. A little postoffice called Goltrana. Goltrana is the name of the place. It is only three or four miles away from Gulkana, and possibly five miles.

(Testimony of Clifford G. Polk.)

Q. And where was this equipment under the Lytle-Green contract assembled, in Alaska?

A. At Valdez.

Q. It was shipped to Valdez and unloaded from vessels there, then taken overland to Gulkana?

A. That is right.

Q. Yes, and that was the—was Gulkana on the Richardson Highway? A. Yes.

Q. On the Richardson Highway. Now, you have in mind, of course, these Sections A-1 and A-2 involved in the principal contract, have you not? You have those in mind? A. Yes.

Q. I think you made a sketch that was introduced in evidence. A. Yes. [29]

Q. Now, it was necessary, was it not, to—in order to reach Flannel—that is the end of the hundred and fifty-five mile limit, to construct that section of road over A-3, for the purpose of moving in equipment, and machinery and supplies—is that correct? A. No, sir.

Q. I beg your pardon?

A. No, sir, it is not correct.

Q. Well, why was the stuff assembled at Gulkana?

The Court: That was assembled at Valdez.

Mr. Peterson: No, I mean after it left Valdez.

A. Well, why was the stuff—

Q. Yes.

A. —assembled at Gulkana?

Q. How did Weldon Brothers get their equip-

(Testimony of Clifford G. Polk.)

ment in on the hundred and fifty-five mile section?

A. They rode it in from Valdez.

Q. I beg your pardon?

A. They brought it over the road from Valdez to Salana.

Q. Well, all right. Did they use that—any of that Section A-3 to move their equipment over?

A. Yes, all of it.

Q. Yes, all of it. A. Yes. [30]

Q. They couldn't have gotten in these otherwise, could they? A. No.

Q. I mean—

A. They had to go over A-3. They had to go over the road to get to Salana, certainly.

Q. Yes, and that was true of the other contractor who went in on the hundred and fifty-five mile section. A. Yes.

Q. They had to use that Section A-3 road?

A. Yes.

Q. Yes. Now you had begun work on Section A-3, and you say on July 7th? A. Yes.

Q. What was the situation there with respect to timber and clearing, and matters of that kind? Was it a timbered area?

A. It is typical of all Alaska country. It is timbered—it is a heavy growth of very small timber.

Q. Small jackpine they call it?

A. Well, on that nature, but it is not jackpine.

Q. Yes, and that was true all the way from Gulkana to Salana, generally?

A. Except for the existing roads, yes.

(Testimony of Clifford G. Polk.)

The Court: I wish you would go ahead and tell me—I want to interrupt you, Mr. Peterson, I have to [31] in order to keep this clear in my own mind.

Was there a road already built?

The Witness: Yes, sir.

The Court: That is known as Section A-3 from Gulkana to Salana, over which equipment could be moved?

The Witness: Yes, sir.

Q. When was that road built?

A. That was built by the Alaska Road Commission, I think in 1938.

Q. In 1938? A. I believe so.

Q. And was it open to travel?

A. Yes, sir, there was considerable airport construction going on up in that area before we got there and all those supplies came in over that road.

Q. Where did that road extend to?

A. It extended to a place called Nebesna, about thirty to forty miles east of Salana.

Q. Was there a road right into Salana from Gulkana? A. Yes.

Q. How much of a place was Salana?

A. There was nothing there except one deserted roadhouse.

Q. Now there was a road from Gulkana to Valdez? A. Yes, sir.

Q. Now, isn't it a fact, Mr. Polk, that the first order to [32] do work on the section outside the hundred and fifty-five mile limit was dated July 7

(Testimony of Clifford G. Polk.)

—given July 7, 1942, and that was to begin work on Section A-3?      A. No, sir.

Q. You say that is not correct?

A. That was—that was not the date of the telegram that I received that authorized this work on A-3.

Q. Now there was a trail road—a road called the trail. What road was that? Wasn't there a road out there into Gulkana known as the trial road?

A. No, I don't think so. The trial road is the term applied to that road that we built during the season of 1942.

Q. 1942, and where did that extend from?

A. From Salana to the International Border, and also from Big Delta Tanacross or Hope Junction.

Q. That run from Gulkana to Salana?

A. Well, as I say we refer to the trial road as that portion that we built which was from Salana to the Border, and also from Big Delta to that connection there near Tanacross. No, it is not the trail road, I don't think, that applies to that section from Gulkana to Salana.

Q. Well, shortly after Lytle Company got into Alaska, almost immediately after, weren't they ordered to assist in opening up the trial road, and that is within the hundred and fifty-five mile area, I understand? [33]      A. Oh, yes.

Q. Yes.

A. We assigned two contractors to that.

(Testimony of Clifford G. Polk.)

Q. Only two? A. That is all.

Q. Was that trail road the site of the permanent road?

A. Yes, sir, it was never changed.

Q. And when were they assigned there, the trail road?

A. Well, they were assigned there I would say—I can't give a definite date, but it was shortly after July 1, 1942.

Q. Shortly after—did they go to work then?

A. They did not go to work because they had no equipment.

Q. Oh. When did their equipment finally come?

A. Roughly the middle of July, and it took another fifteen days to get it on the job. They went to work just as soon as they could get their equipment to the job.

Q. Yes.

A. Which was about August 1st.

Q. But they were originally assigned to that job? A. Yes.

Q. Yes, and until the equipment came they were filling in time around there some place?

A. Yes.

Q. On other stuff, is that correct? [34]

A. That's correct.

Q. And that's those two contractors you referred to. That's the two contracting firms you referred to, Weldon Brothers and the other?

A. Yes, sir.

Q. Yes. You are familiar with the original con-



(Testimony of Clifford G. Polk.)

tract, are you, Mr.—you are familiar with the original contract between the government and Lytle & Green?

A. Well, I was at one time, but I——

Q. Yes.

A. ——but I don't know whether I am right now.

Q. Do you recall that it contained a provision that the contract officer or his representative may at any time by written order, and without notice to sureties if any, make changes or additions to plans and specifications, issue additional instructions requiring additional work on Sections A-1 and A-2, and/or to work on other sections of the highway? Were you familiar with that provision?

A. Yes, sir.

Q. Did you make any written orders according to this contract?

A. We made a written order later.

Q. When?

A. I don't remember, but it was after the work started.

Q. Have you a copy of that?

A. It was after the work started. Pardon? [35]

Q. How long after the work started?

A. I would say that would be the latter part of August.

Q. That was simply confirming the oral orders theretofore given? A. Yes, sir.

Q. Now, will you produce that—can you produce a copy of that order? A. No, sir.

(Testimony of Clifford G. Polk.)

Q. Where is it, do you know?

A. All documents are in Washington, D. C.

Q. Have you made any effort to obtain that?

A. I did not make an effort to obtain that one,  
no.

Q. You don't have a copy of it in your files?

A. All my files are in Washington, D. C.

Q. In what department, if you please, do you  
know? A. Pardon?

Q. What department has control of those files  
in Washington, D. C.?

A. It is the Public Roads Administration.

Q. Mr. Bright still the head of that?

A. If anyone is at the head of it he is, but that  
isn't his present job. There is no such thing as the  
Alaska Highway District any longer. I don't know  
whether there are any employees.

The Court: Well, the Public Roads Adminis-  
tration [36] is headed by Mr. McDonald, isn't it?

The Witness: Yes, sir.

Q. Who prepared that written instrument con-  
firming the previous oral orders? A. I did.

Q. You did. Did it refer to—your recollection  
now it referred to every oral order which was given?

A. Would you repeat that, please?

Q. Do you recollect whether it referred to every  
oral order which you gave with respect to changes  
and locations?

A. I think not. I do not think so. I think it  
was just the general authorization for them to pro-  
ceed with construction on Sections A-3 and A-4.

(Testimony of Clifford G. Polk.)

Q. Did you keep any diary or any records when you gave these oral orders?      A. Yes, sir.

Q. You did?      A. Yes, sir.

Q. Where is that?

A. I do not know. It's in Washington, I presume.

Q. Oh, you—you didn't keep any record of it as far as that is concerned, which you now have?

A. No, sir.

Q. Do you know—you couldn't, I don't suppose, give us any estimate of time consumed in unloading this equipment [37] at Valdez, the equipment of these two contractors who worked on A-1 and A-2?

A. Well, I can say that the first boat load came in about June 18.

Q. About June 18.

A. And the—all the equipment was on the project about September 1st, but it did not all come in on that first boat.

Q. Well, I understand there was a large quantity of equipment.      A. Yes.

Q. Do you know—I don't suppose you have any independent recollection when Weldon Brothers' equipment came in, do you?

A. No, I don't. Dusenbergs' though, was one of the last to come in.

Q. And do you know when that was?

A. Their equipment—their equipment didn't arrive there until about the 1st of August in Valdez, or a little before that, probably.

(Testimony of Clifford G. Polk.)

Q. Now in your previous testimony in this case, I think you identified payrolls in connection with Dusenbergs and Weldon's work, did you not? Do you recall that? A. Well, I think I did.

Q. Yes. [38] A. I don't remember.

Q. I wonder if those payrolls are in the record here. What I was interested in was to find out whether or not there was included in those payrolls the time of unloading equipment and material at Valdez.

A. I am pretty sure the payrolls included all their time from the time they were hired in Iowa, up through this August 31st date.

The Court: Now, is the time involved here to August 31st or August 1st?

Mr. Peterson: August 31st, your Honor.

Mr. Sager: August 31st.

The Court: From June 17th to August the 31st?

Mr. Sager: That is right.

Q. Were Weldon Brothers one of the first outfits to get in there?

A. Mr. Weldon himself was one of the first to arrive in there——

Q. Now when——when——

A. ——first of the contractors, but I do not recall whether his outfit was one of the first or not.

Q. About what time did he arrive, do you recall?

A. Mr. Weldon himself arrived about June 22, in company with Mr. Crowley.

Mr. Peterson: I would like to see that large [39] document there, bills. That's it. I wonder if we

(Testimony of Clifford G. Polk.)

can find those two payrolls which, as I recall, they were introduced in evidence of Weldon Brothers and Dusenberg.

The Court: Mr. Peterson, I am just wondering if you couldn't more expeditiously get at this thing and be able to make direct inquiry of the witness, for the purpose of the record—later. I mean by working with Mr. Sager and Mr. Polk?

Mr. Peterson: I think we can get along. I think that is a good suggestion, your Honor, I think that can be done.

The Court: And I could adjourn and give you an opportunity to do that. What I am interested in, of course, here is, under the direction of the Circuit Court, to ascertain what men were recruited and brought up there subsequent to the 17th day of June, 1942, and were kept on the job, or worked on this job, or under this peculiar language here that has been cited to me, worked on branch roads that were essential roads in order to get in equipment, or worked in unloading and assembling equipment, so as to bring them within the coverage by the policy, and——

Mr. Peterson: I think——

The Court: ——and those rather comprehensive payrolls and other figures that do not touch upon that are [40] unnecessary, and I want to ask this question—I think I have asked it in one form or other, but I want to keep it so as to get it clear in my own mind, and that, first I would like you to explain what you mean by the army bottleneck that you referred to.

(Testimony of Clifford G. Polk.)

The Witness: Salana is at the confluence of two rivers, the Salana River and the Copper River. The Salana River in which we proposed to build our truck trail, is in a canyon—rather deep canyon and with precipitous side slopes.

The Court: Well now, was that the truck trail that was later designated as Section A-2?

The Witness: That would be—yes, sir, A-2, and the Army occupied that area by the time we got there with an entire regiment—some—I believe about twelve hundred soldiers, with lots of equipment, and there was nothing we could do. We couldn't get by them, and if we could get by them, there was no place to go. Well, it was impossible to get by them, that is all there was to it.

The Court: Well, was Section A-3 from Gul kana to Salana a sufficiently developed road that the assembled equipment at Valdez could be brought in to Salana?

The Witness: Yes, sir. I might add that other contractors—Morrison-Knutsen were shipping—oh, eight to ten truckloads a day over that road to Nebesna, from which they flew all their equipment to an airport called North Norclay. They were hauling over the road all the time. It was in the season of the year, though, when the road was soft. That was in May and June.

The Court: Well, was Section A-4, coming in from Fairbanks by the Big Delta Junction down to Tanacross Junction, a completed highway?

The Witness: No, sir, there was nothing but

(Testimony of Clifford G. Polk.)

virgin wilderness, the same as Section A-1 and A-2—all virgin wilderness. Section A-3 had a road over it.

The Court: Was it essential to reach A-2 or A-1 for the purpose of transporting equipment and bringing in men to first construct A-4?

The Witness: I don't believe I understood that.

The Court: Could the contractors have proceeded with A-1 and A-2, without first working on A-4?

The Witness: Yes, they could go in by Salana.

The Court: Well, was it contemplated they come in the other way?

The Witness: No, no, that wasn't contemplated at all.

The Court: Well, then, why was it that part of these employees who were recruited for A-1 and A-2 [42] were shifted to A-4? Or were they?

The Witness: They were shifted to A-4 because—well, that's because of the war developments at that time. Fairbanks became a more important place than Anchorage, apparently.

The Court: But did that shifting have anything to do in the period that is here involved, from June 17th to August the 1st, with the construction work of A-1 and A-2?

The Witness: Well, frankly, I don't understand the question.

The Court: What I am trying to get at, Mr. Witness, is whether A-4 had to be built, either in

(Testimony of Clifford G. Polk.)

whole or in part, in order that you could proceed with the construction of A-1 and A-2?

The Witness: No, sir, it did not.

The Court: And your testimony is that Section A-3 was a passable highway over which assembled equipment could be brought in to commence work on A-1 and A-2?

The Witness: Yes, sir.

The Court: Now if that suggests questions to either of you later you can interrogate, but I wanted to get that clear, and then possibly make it easier for the parties to get at these payrolls as they touch upon these things. [43]

Now at Valdez, Alaska, when a shipload arrived, there were a substantial number of employees on the job, then?

The Witness: Yes, sir.

The Court: That belonged to these two contractors—subcontractors who would undertake the construction of A-1 and A-2?

The Witness: I do not know what contractors they belonged to, but there were plenty of contractors' men, although that first boat did arrive before very many contractors' men reached Alaska.

The Court: That's all that I have in mind. Let me ask you this: Was any of this assembled equipment moved from Valdez to any part of Sections A-1 and A-2 during the period here involved, from June 17th to August 1st, of '42?

The Witness: Not prior to August 1st.



(Testimony of Clifford G. Polk.)

Mr. Sager: Well, August 31st is the date, your Honor.

The Court: August 31st?

The Witness: Yes, sir.

The Court: And was that a substantial amount of it?

The Witness: I believe it was all the equipment of those two contractors, Weldon Brothers and [44] Dusenberg.

The Court: That involved the services of quite a number of men?

The Witness: Oh, yes.

The Court: I ask that so you can get that payroll.

Now, when these men were recruited, and this may be in the previous record, but I am not sure, I remember that they stated that they were recruited largely in the Middlewest and Iowa, and from Illinois and Nebraska and Texas—similar to that?

The Witness: Yes, sir.

The Court: And immediately upon their acceptance of employment they went on the payroll—or immediately upon—I had better correct that question. Immediately upon starting on their journey?

The Witness: Yes, sir, that is true.

The Court: They went on the payroll, and were they recruited for particular contractors or sub-contractors?

The Witness: Yes, sir.

The Court: And then would your record show

(Testimony of Clifford G. Polk.)

which ones were recruited to work for these contractors who had A-1 and A-2?

The Witness: Yes, sir, the payroll records [45] show each contractor's employees.

The Court: In the light of these answers, I am going to suggest that counsel, when you are working over these files get the date of recruitment and the number of men that were involved under—or for these two contractors. I think that is all and I am going to let you try to work out some of those details. I don't want to have to try this case all over again, and this opinion of the Circuit Court doesn't call for that type of a determination, because, in many respects, the opinion of the lower court was affirmed.

Mr. Peterson: I would like to ask the witness another question.

Q. Was this so-called trail road readily passable between June and August, with trucks and equipment? A. Between what points?

Q. Between Gulkana and Salana?

A. No, it wasn't readily passable. The time of the year made it rather muddy.

Q. It was necessary to keep quite a large maintenance crew on that all the time, wasn't it?

A. Well, we did, because we did not have much else to do, but they were getting through without our help before we got there.

Q. Well, they were kept there just the same, that's true, [46] isn't it? A. That's right.

(Testimony of Clifford G. Polk.)

Q. And those were members of—employees of some of these different contractors on this job?

A. Yes.

Q. That is correct? A. Yes, sir.

Q. Do you remember—can you give us the names of some of those contractors?

A. That was engaged on that maintenance work?

Q. That were—yes.

A. No, sir, I cannot, but I can give you the names of the contractors engaged on reconstructing the road.

Q. Well, can you do that readily?

A. Yes, sir.

Q. But you can't give us the names of the contractors who were engaged in the maintenance of it?

A. Well, as you said a while ago it was just a mixture of a lot of them, a few men from every organization, I guess, for a while.

Q. About how many were kept there on the maintenance so it was kept passable?

A. Up to the time they went over to their assignments I would say there was somewhere between twenty and fifty.

Q. Between twenty and fifty, and then that was maintained [47] right along, as long as there was work carried on there, that's true, isn't it?

A. Yes, there was a small maintenance crew kept there all summer and all fall. Incidentally, later on it was under this contractor by the name of Lundeen.

(Testimony of Clifford G. Polk.)

Q. Lundeen?           A. Yes.

The Court: But this twenty and fifty, were they all from the crews that were recruited for the purpose of working on A-1 and A-2?

The Witness: They were from any of the men that happened to be available, regardless of the contractors. That was just at the outset.

The Court: Do you have any way of segregating, as you are familiar with this case, which ones of them came from the two contractors who had this—these two sections of highway involved in this litigation?

The Witness: No, I have not.

Q. Is there any way, with your familiarity with the records, of segregating the employees, naming them by name, if possible, who worked on this maintenance proposition?

A. No, sir, there were very few of them compared to the twelve hundred that were up there. I haven't the slightest idea who it was.

Q. Well, I think you said fifty, or such a matter, something [48] like that?

A. I said from twenty to fifty.

Q. Twenty to fifty.

A. Was engaged, but that was before their equipment arrived, and they——

Q. I beg your pardon?

A. That was before their equipment arrived and they were scattered along the road.

Q. Well, was that road passable during the summer period without being well maintained?

(Testimony of Clifford G. Polk.)

A. It was very passable from about—from about the 15th of July on it was very passable.

Q. It didn't require any particular maintenance?

A. After Lundeen took over—took charge of the maintenance of that section he employed a crew of about twenty men, one or two motor patrol graders, and three or four trucks, and that is for the entire sixty miles.

Q. Well, I understand from the time they moved in there about June 17th or 18th until Weldon Brothers and Dusenbergh had moved in, there was a substantial crew there maintaining the road.

A. A substantial crew maintained the road or otherwise engaged on it, just to keep them busy, mainly. It was quite readily accessible from their camp and they had no equipment. [49]

Mr. Peterson: Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as Your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.

The Court: That's the reason if the parties are

(Testimony of Clifford G. Polk.)

advised of what the Court's position in the matter of law is going to be you ought to be able to work that out, and its very clear that this case can only be finally disposed of on the matter of dollars and cents, by some fair, reasonable and logical compromise, because there is no possibility of definitely ascertaining what the wages were of each of these various men who no one knows now, hardly, where they could be found or who they are, and——

Mr. Sager: If Your Honor please, we have the payrolls and I have a summary which I have submitted to [50] counsel——

The Court: Sure, but the payrolls have become so jumbled, insofar as the law has been announced here by the Circuit Court. If you pin yourself down to just work done on these two sections in this period of about sixty-five or seventy days, that would be a very simple matter, but unfortunately the Court has seen fit to inject another element into this case. This Court tried the case upon the basis of the payrolls submitted in accordance with the insurance contract. The Circuit Court now calls for a different determination, and it might be a question as to where the burden rests, but it seems to me that if you do not approach this with some spirit of compromise it is very evident to this Court now that more than the payroll of two contractors, who stood around there or sat around there, or what they did, on Sections one and two, for a period of sixty or seventy-five days, is involved in this case. It's more than that amount.

(Testimony of Clifford G. Polk.)

Mr. Sager: That may be so, Your Honor, but that is the purpose of this hearing. If your Honor will determine what part—give some basis or some formula. I don't think there is going to be any question on these payrolls. We've got them all here and got them all segregated, and I have submitted them to counsel. [51]

The Court: It would have been much simpler if the Circuit Court, in view of the position they have taken in this case would have determined the formula themselves.

I am inclined to hold, gentlemen, that this premium should be calculated upon all employees who were recruited to work on these two sections, from the time they went on the payroll subsequent or including June 17th, 1942, until the time they were diverted, if they were, after their arrival in Alaska, and of course the maximum outside limit would be August 31st; that these men who were recruited to work on these two sections should have not only their payroll time calculated while in transportation to work upon it, even though they were later diverted, but such men as worked in unloading, assembling equipment at Valdez, to be used on this job, and such men as worked in moving the equipment from Valdez to the—Salana or any other point along this 155 miles of highway; and likewise such men as were used from these crews to maintain the highway in the condition that equipment could expeditiously be moved along it on this part of the road known as Section A-3.

(Testimony of Clifford G. Polk.)

Now, from that outline if you can by an examination of the records or in any other way arrive at what that would be, then it would be fairly simple for the [52] Court to take your aggregate figures and arrive at a judgment.

Mr. Peterson: Well, Your Honor, there is another matter that maybe I haven't made it sufficiently clear. I can probably make it clear by reading a letter from Mr. Rice of the Lytle Company on the 13th in which he says that all of the initial organization for moving is on the work under the highway contract, was delegated, so to speak to Sections A-1 and A-2, which I believe are referred to as the 155 mile section named in the contract.

"Shortly after getting into Alaska at the site of the work we were ordered to assist in opening up the trail road. Whether or not this trail road would come under the 155 mile section, I could not say. We don't find any record of being ordered out of the trail road or to my knowledge. Did, however, find a written memo order directing the contractors to work on Section A-3"—and that is the trail road, "which is outside the 155 mile limit. and this order bears the date of July 7, 1942."

Now, Your Honor, assume that this is the situation; that no order to work any other place was given until July 7th, and these men originally shipped up as Mr. Rice indicates was in connection with A-1 and A-2 all, not only these two contrac-



(Testimony of Clifford G. Polk.)

tors but all of them and [53] there has been no diversion until July 7th, then would we not be entitled to have the payrolls of that date on all employees used as a base for premium computation?

The Court: Yes, if that were an undisputed fact.

Mr. Peterson: I understand.

The Court: But this witness who was in charge, and whose testimony must be given great weight and consideration, unless it be discredited, states the contrary.

Mr. Peterson: Well, that's true, but I suppose to take the deposition of the witnesses who were on the job.

Mr. Sager: The only contention he is making there is that Mr. Rice is referring to some written order. Whether they gave him a written order or oral order isn't material here from the insurance standpoint. If they gave him an oral order and referred some places to that, the fact that the government contract says upon written order, does not put the insurance company in any better position, and apparently that is what Rice is talking about there, a written memorandum.

Mr. Peterson: The question of whether or not the men were recruited in Iowa and Nebraska for some unit outside of the 155 mile proposition is one thing, but if they were all recruited and all sent to Alaska under the [54] original contract for the 155 mile section, and then after they arrived at Gulkana, they were assigned to some different job

(Testimony of Clifford G. Polk.)

at that time, then I submit we are entitled to have the wages included up until the time when they were assigned to some other job.

The Court: I think that is true, limiting it however, to the effective date of this insurance contract.

Mr. Peterson: Yes, that's right.

The Court: The men that were recruited prior to that, even though they were recruited to work for these two contractors and who made the journey and who were on the payroll, would not be included.

Mr. Peterson: We are not making any such contention as that. We agreed that June 17th is the date from which we——

The Court: Well I don't see how your position is at all contrary to the position the Court's just taken now, excepting on the written orders not coming—not being issued until July 17th. I shall have to find that the diversion of the men, whenever it took place, within the life of this insurance contract, irrespective of the nature of the order in which it was made, would be the effective date. Now it seems to me that ought to give you some basis of calculation where you ought to be able to get together very nearly on this. [55]

Mr. Sager: I think we can, Your Honor, at least as far as the figures are concerned, I think we can determine the figures.

The Court: While this witness is present here and you have the benefit of his recollection and his ability to explain the documents that were offered

(Testimony of Clifford G. Polk.)

in the initial trial in this case, I feel that advantage should be taken of that situation, and then if there is some issue left in dispute that you want to take a deposition upon, or if there is something for the purpose of the record you want to make an offer of proof, you will be permitted to do that, of course.

Mr. Peterson: Mr. Polk, just before we leave this matter of assignment.

The Witness: Yes, sir.

Mr. Peterson: Do I understand that when these contractors came up there on the job, then they were assigned to some particular section?

The Witness: Yes, sir.

Mr. Peterson: Yes, and that was after arrival there?

The Witness: Yes, although some of these outfits didn't get in until very late.

The Court: I understand, but after they arrived there then you assigned them to a job? [56]

The Witness: Yes.

Q. (By Mr. Peterson) continuing: Now, I don't know whether you can advise us on this or not. Just as a matter of information, there is an Exhibit 10 here, which is a payroll in the amount of \$309,000.00. Do you know whether or not you took that into account when you testified regarding the Dusenbergs and Weldon disbursements?

A. Well, I don't know—I don't know what this payroll covers.

Q. Well, that is the payroll beginning about June 17 to July 15, inclusive, of 1942. Am I correct

(Testimony of Clifford G. Polk.)

in that? Anyway, it is to July 15th, 1942, I am very sure of that.

A. And the question again?

Q. I beg your pardon?

A. What was the original question?

Q. Do you know whether or not when you testified regarding the payrolls on Weldon and Dusen-berg on this 155-mile section, you had the—you took the figures in that particular computation into account?

A. I can't definitely say, but I imagine that I did.

Q. Well, do you have any independent recollection of it?

A. Well, to me this looks like the original payroll of the entire Lytle & Green set up.

Q. No, you are in error in that, Mr.—that's only for the [57] first period, to July 15th.

Mr. Sager: But it covers all the contracts.

Mr. Peterson: It covers all the contracts.

A. Well, yes.

Mr. Peterson: So far as I know.

A. Yes, it does cover the Dusen-berg and the Weldon for that period.

The Court: I think I shall adjourn court and continue a further hearing in this matter until—I could resume at 2:00 o'clock if you think you will have gotten anywhere, but I don't see how you can with so——

Mr. Peterson: I think it is impossible, Your Honor, without—I think we can probably take these

(Testimony of Clifford G. Polk.)

payrolls if the Court will make an order allowing us to withdraw the exhibit 10.

The Court: A minute entry may be made to the effect that—you mean withdraw it entirely?

Mr. Peterson: Withdrawing that for the purpose just of making the computation, Your Honor.

The Court: Yes.

Mr. Peterson: Oh, no, we don't wish to withdraw it. It's an essential part of the record, and I think we can agree, Your Honor, on how we will proceed on this accounting matter with Mr. Sager, and——

The Court: Yes. Well, I could take this up [58] at 2:00 o'clock tomorrow afternoon again and see what progress you have made. I can just continue the matter until then, and then if it is necessary to set it down for some other date I can do that. If you have made substantial progress in the matter as the court has outlined its position on the law, then if you have some offer of proof you desire to make I would like to have you have that in form to do so.

Mr. Peterson: Your Honor, it is impossible to have that in form without getting complete information from witnesses in Des Moines. I am satisfied I will have to take their depositions. I can't see any purpose in continuing this matter——

The Court: Of course you might all be surprised when you get together and go into conference on these figures and be so near together that you will conclude that the party who thinks they ought to have a little more and the party that think they

ought to have a little less, will make a Christmas present to the other, and make a disposition of it.

I have indicated to you pretty well, now, what my position is on the law as I construe this opinion from the Circuit Court. If that happy situation should arise that I have just indicated, why of course you can just announce it to the Court. If it doesn't I can [59] see where you probably will need some additional time and I think perhaps I better continue the case till December the 23rd.

Mr. Peterson: We will endeavor, if it is agreeable to the Court and counsel, to report to the Court. I have just consulted with Mr. Sager. I doubt if we will be able, Your Honor, to get these figures worked out short of a week or ten days.

The Court: Well, I am not trying to tie you to tomorrow afternoon. My thought in that suggestion was that there is a witness who is very material to both parties. He represents the Public Roads Administration of the United States Government, was on the job there, and I don't know what his assignments are, or what his duties are, and how soon he might be compelled to go elsewhere, and I don't want to hold him here any unreasonable period of time under order of the Court.

Mr. Peterson: Your Honor, I think we can do this. I think so far as Mr. Polk is concerned, I think Mr. Sager and myself will agree if there is any questions arise we can just write him and we will accept his written statement of it, if that will be satisfactory to the Court, without his coming

(Testimony of Clifford G. Polk.)

back and being under oath. We could stipulate—I would stipulate we could do that. [60]

The Court: Yes, my thought is you still shouldn't forego the presence and the use of him while he is here. Where is your office? Do you work out of the Seattle office?

The Witness: No, it is in Portland, and I can come up here any time but I have other commitments tomorrow. I would not like to be here tomorrow, but I can come any time.

The Court: Well you might see what you can accomplish today—the rest of the day, this afternoon on some of these matters involving these figures and this case will be continued on the record until December the 23rd. That's all.

Mr. Peterson: Now I wonder if the Court will make an order permitting the plaintiff to withdraw Exhibit number 10 for the purpose of calculation.

The Court: It will not require any written order, but the clerk will make a minute entry permitting the plaintiff to withdraw that exhibit for the reasons requested.

4:05 o'Clock P.M.

The Court: Now, you may proceed.

Mr. Sager: Since this morning's session, and in view of Your Honor's indication of what the proportion [61] of these payrolls should have been included in the premium base, I thought it advisable to put on some additional evidence regarding certain of those matters and I would like to call Mr. Polk

again to the stand. Before inquiring of Mr. Polk, however, we want to offer some additional exhibits. One is a certified copy of the payroll of the contractor Dusenberg. It was originally identified as Defendant's Exhibit A-11, but it was not admitted in evidence at the other hearing. That may carry the same number if it is satisfactory.

The Court: It will keep the same number. Do you have any objection, Mr. Peterson?

Mr. Peterson: No objection, Your Honor.

The Court: It will be admitted.

(Whereupon certified copy of payroll referred to was then received in evidence and marked Defendants' Exhibit A-11).

Mr. Sager: There is attached to that exhibit a pencil computation made by Mr. Polk at the prior hearing, which shows the total of the payroll—of that portion of the payroll, attributable to this policy period from June 17th to August 31. I think we have agreed that is the proper—

Mr. Peterson: We will agree that is correct.

Mr. Sager: That total is \$102,380.24. That represents the entire payroll of Dusenberg contractor [62] during the period June 17 to August 31.

Now we offer also a certified copy of the payroll of Weldon Brothers which was previously identified as Defendants' Exhibit A-12. It likewise has a pencilled computation of the portion of that payroll attributable to the period June 17th to August 31, the total being \$71,357.66.

The Court: Any objection to that document?

Mr. Peterson: We have no objection.



The Court: It will be admitted and bear the same marking that it did when the case was first heard.

Mr. Peterson: I have no objection to the exhibit and we agree that the computation is correct. Your Honor.

(Whereupon payroll referred to was received in evidence and marked Defendant's Exhibit A-12.)

The Court: Very well.

Mr. Sager: We will offer Defendants' Exhibit A-15. It is a computation of the payroll of all of the other contractors, other than Dusenbergs and Weldon Brothers, during the period from June 17th to the arrival and—of the men of these contractors in Alaska on the job and their diversion to other work than Sections A-1 and A-2. It has an adding machine tape attached to it showing the total of that computation for the entire [63] number of men, and the total of that is \$137,932.80. We have agreed that that is an accurate computation.

Mr. Peterson: Yes, we agree to that.

The Court: It will be admitted in evidence.

(Whereupon payrolls referred to were received in evidence and marked Defendants' Exhibit A-15.)

## CLIFFORD G. POLK

recalled as a witness on behalf of the Defendants, was examined further and testified as follows:

## Direct Examination

By Mr. Sager:

Q. Now, Mr. Polk, you testified this morning that there were some work on the part of all of these various contractors in unloading and transporting their equipment from Valdez into the job.

A. Yes.

Q. Would there be any means of determining the actual and accurate payroll of those men upon that type of work?

A. No, there is no way that you can determine it mathematically correct.

Q. Have you given consideration to the matter and arrived at an estimated figure of what that payroll would be?      A. Yes. [64]

Q. What was that figure?      A. \$35,000.

Q. And that would be for all the men of all the contractors, exclusive of Weldon Brothers and Dusenberg?      A. Yes.

Q. And that figure would cover both the unloading and the transportation——      A. Yes.

Q. ——to the job. Now likewise you testified this morning that some of the men were used upon Section A-3 in maintaining that section of the highway. Would there be any way of determining accurately the number of men or the payroll attributable to them while engaged in that maintenance work?      A. No, there wouldn't.

Q. And have you given consideration to an esti-

(Testimony of Clifford G. Polk.)

mate of that figure for the period covered by the policy?      A. Yes, I have.

Q. What is that figure?

A. In dollars it amounts to twenty-two thousand, five hundred and ninety-four.

Q. And are those estimates in your judgment a fair estimate of the total of the amount of money expended in payroll for those two—or for that work?

A. Yes, and that does not include the Dusenbergs nor Weldon. [65]

Q. The maintenance figure you gave. It excludes those?      A. It excludes those, yes.

Mr. Peterson: I understand, Mr. Sager, the computation—did you state that it was furnished you by the Attorney General's office, the computation? I just wanted to show the source, is all.

Mr. Sager: It came to me from the Attorney General's office, but it was computed in the office of the Public Roads Administration.

The Court: Well, now are these figures of \$35,000 for Valdez and \$25,594 for work on Section 3,—maintenance section? You say exclusive of the employes of the two contractors who had the subcontract on Sections 1 and 2?

The Witness: Yes, sir.

Mr. Sager: The reason for that being, Your Honor, in the two exhibits we show their entire payroll.

The Court: Oh, I see, and then it would become a matter of calculating the deductions, is that it?

(Testimony of Clifford G. Polk.)

Mr. Sager: Well, we don't want to duplicate their payroll twice. Your Honor indicated this morning, you—at least I interpreted that you thought the entire payroll of those two contractors who went to work on Sections A-1 and A-2 would be attributable to the premium base. [66]

The Court: That's right.

Mr. Sager: So we show that by these two exhibits—these two payrolls, their entire payroll. Now some of those men worked in unloading equipment and hauling it in and also worked on this maintenance, so they, in his estimates of the amount of payroll attributable to these two functions, we have excluded—he has excluded any of the Dusenbergs and Weldon Brothers men, because their entire payroll—

The Court: What I am interested in is what was the Dusenbergs and the Weldon payroll—what was that payroll in connection with the unloading and in connection with the maintenance? Can that be arrived at from these exhibits, and these calculations?

Mr. Sager: No, it can't.

The Court: That's the question we have for determination.

Mr. Sager: Well, if you include their entire payroll during the period that the policy covered, you wouldn't be interested in whether it's one phase of the work or another, and it was my thought that that was your Honor's indication this morning that their entire payroll should be included.

(Testimony of Clifford G. Polk.)

The Court: No, that doesn't seem to me to answer the problem that I feel that I have for decision, [67] because it's contended and it's admitted that a part of their entire payroll during this time was on diverted work, during the period from June 17th to August 31st, inclusive.

Mr. Sager: That is right.

The Court: And so it doesn't help—this situation doesn't help in the solution.

Mr. Sager: Well, then I misjudged your statement this morning, because I took it that——

The Court: No, if it was merely the simple matter of adding or subtracting here with figures that the witness testifies to, we have a different situation. What I wanted to get at was how much of the Dusenbergs and Weldon payroll was given to unloading equipment and all of the necessary preparatory steps to moving it in to the job, which would be chargeable as a part of the contract Sections 1 and 2, and how much of their payroll during that period would be taken on the repair and maintenance of the highway so the equipment could be moved in to the place where it was to have been used, though by reason of later diversion orders it was not moved there.

Mr. Sager: In other words then, as I understand it now, your Honor made no distinction between Weldon Brothers and Dusenbergs and any of the other contractors. [68] In other words, their time in transportation in there and their time in unloading and transporting equipment and main-

(Testimony of Clifford G. Polk.)

tenance would be a part of the premium base, but work done elsewhere would not be.

The Court: That is correct, but not the employees of the other contractors.

Mr. Sager: Well, of course none of the other contractors ever worked on any of these two sections during the policy period.

The Court: No, but they commingled their men, as I understand it, with the men that were working on the maintenance work on Section 3 that went from Valdez into the point where this work was to begin. There were men there from all contractors you testified this morning, Mr.—

The Witness: That is true up until they started to work on their assignments. That is true from the time they arrived in Alaska to the 1st of August when they started on their assignment on Section A-2.

The Court: The 1st of August?

The Witness: Yes, that is the date that has been set that they started their assignment, I believe.

Q. That is Weldon Brothers and Dusenberg?

A. Weldon Brothers and Dusenberg.

Q. That is the time they started to work on Sections A-1 [69] and A-2? A. Yes.

Q. Well, these estimates—

The Court: Let me ask you if you have any proof at all in this record, either this subsequent record you are making now or in the prior trial, as to the time of the work in Sections A-1 and A-2,

(Testimony of Clifford G. Polk.)

during the period covered by this contract of insurance?

Mr. Sager: That is clear in the first hearing. That is the figure used by the Circuit Court——

The Court: Very well, that is not an issue.

Mr. Sager: August 1 to August 30, the only time that anybody worked on A-1 and A-2, actually.

The Court: Then we have from June 17th to August 1st, the work and the travel time for which these Weldon Brothers and Dusenberg employees were employed on the maintenance of the road and the loading and other incidental work in connection with the equipment at Valdez, or unloading.

Mr. Sager: That is not in the record without additional proof here, although I think we can readily get it.

The Court: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I [70] am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections—that's 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract.

(Testimony of Clifford G. Polk.)

Mr. Peterson: I think I misunderstood your Honor on that matter. I understood the ruling of the Court to be with respect to travel time that travel time applied to all contractors, or labor performed by employees of all contractors, until such time as a diversion was directed.

The Court: There has never been any contention in this case that the insurance premium should be calculated upon the employees other than those that were engaged by these two contractors on these two sections, and such things as are incidental to that work.

Mr. Peterson: Well, now, your Honor, it has been our contention all the time and is now, that for the purpose of the premium base, all work performed under the original contract up until such time as a diversion was directed, should be considered in computing the premium base because it was done under the principal contract for the 155-mile section.

The Court: Well, the 155-mile section is just those two sections that are designated in this record as Section 1 and Section 2-A.

Mr. Peterson: Until a diversion was directed, your Honor. All employment was done under the principal contract. After a diversion was directed then obviously it presented a different situation. Assume there hadn't been any diversion at all, and this work had gone on to completion, there wouldn't be any question about it, but after the contract was



(Testimony of Clifford G. Polk.)

made and before any diversion was ordered, all contractors were—had employees who were operating obviously under the original contract in going to work, for instance. Now, if after they got up there they were diverted to some other section, then of course under the decision of the Circuit Court of Appeals, after that diversion, their wages did not become subject to computation or included in the base, but until such time as there was a diversion, they were operating under the original contract. [72]

The Court: Well, I think your error occurs in this, Mr. Peterson, that you would calculate all the recruited employees of these two sections of highway when in fact they were recruited for at least five sections of highway and under at least five separate subcontracts.

Mr. Peterson: I think your Honor is assuming something that's not in the record. There wasn't any diversion order until after this contract was made and until after these men—I understand, according to Mr. Polk's testimony there was no diversion of any men until they got into Alaska. Up until that time they were operating under our original contract.

The Court: No, my recollection of the testimony in the trial in the first instance was that this firm of Lytle & Green were sort of super-contractors, over at least five different contracting concerns, and the engineering had been done and the contracts had been awarded. This is the first time that I have

(Testimony of Clifford G. Polk.)

been advised that it's the contention of the plaintiff that all employees were chargeable to these two sections.

Mr. Peterson: Why, your Honor, that is what they were hired primarily for, and they all had contracts but they didn't have any contracts for any particular section—these so-called subcontractors, and they were [73] shipped to Alaska under this original contract. When they got to Alaska—

The Court: When you say original contract you mean—

Mr. Peterson: I mean the 155-mile proposition. When they got up to Alaska and arrived there at Gulkana, as I understand, after they arrived there, Mr. Polk, there, the representative of the PRA, assigned them to different places other than this 155-mile, but they went up there pursuant to the contract for the 155-mile section, and we relied unquestionably, until they arrived there and until they were assigned to Section 3 we will say, or Section 4, or some other section, and after the assignment of course, then under the decision when they went to work on something else, then of course they were outside the 155-mile limit, but the only contract in existence, as far as Lytle & Green was concerned, was the contract covering the 155 miles. These men were all employed—

The Court: Well, just a moment, let me ask the witness a question to clear this up. I want to avoid, if I can, the time necessary to read that entire transcript of the earlier trial.

(Testimony of Clifford G. Polk.)

What was the setup there in reference to the construction of these five sections of highway? [74]

The Witness: Well, I believe there were only four sections.

The Court: Or four sections, then.

The Witness: The contract provided for the initial construction of Sections A-1 and A-2, the 155 miles, and I believe there is a clause in that to the effect that the following year the government could request—could have the contractors go on to Sections A-3 and A-4. The original contract provided for the construction of A-1 and A-2.

The Court: Then your position is right, Mr. Peterson. Then your position is right. I have been laboring under the impression that there were four sections, and it has been mentioned here several times there were either four or five so-called sub-contractors.

Mr. Peterson: No, your Honor, the subcontractors were all employed and sent up there with reference to Sections 1 and 2. That's my understanding of the matter. The matter I would like to clarify with Mr. Polk, if I may.

#### Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, do I understand that after the contractors got up there, we will say the Western Construction Company, [75] after they arrived there then you assigned them to some other section, is that the way it was done?

A. Yes, that's it.

(Testimony of Clifford G. Polk.)

Q. Now, this computation, I understand that is being offered here this uncertified computation, covers the transportation or the travel time probably more correctly, of the employees going up there with respect to Sections 1 and 2, that's correct, is it not, under the primary contract?

A. Yes, I think that is true.

Q. And after they arrived there then they were diverted to these other sections, Richardson Highway and 3 and 4? A. Yes.

Q. That's the way it happened?

A. That's the way it happened.

Q. Now, in making the estimate of \$35,000 for unloading, do I understand you excluded in making that figure, the unloading of the equipment of Weldon Brothers and Dusenbergs for the reason that in the payroll which had been prepared here, you covered their entire time?

A. The payroll covers their entire time, yes.

Q. And as I understand, you excluded from this estimate what you considered as being the time their employees were engaged in unloading. [76]

A. Yes.

Q. Yes, and that was what amount?

A. Approximately five thousand dollars, for the two contractors.

Q. Yes, and I understand you did the same in connection with the maintenance feature of the road into—from Gulkana to Salana. A. Yes.

Q. You excluded them from the estimated computation on what they had earned on that because

(Testimony of Clifford G. Polk.)

it is included in the entire payroll, which is in evidence?       A. Yes.

Q. Is it possible for you to make any division from the Dusenberg Weldon payrolls?

A. To make any what?

Q. Is it possible for you to make any distribution of the Dusenberg and Weldon payrolls as between the 155-mile Sections 1 and 2, and some other work that may have been done up there by them?

A. Oh, yes, that would be relatively simple because everything commencing August 1st was on A-1 and A-2, but that's the date established when they started and the payrolls start with August 1st. That is, we have a payroll of August 1st—starting with August 1st, the very day they entered on that work. Anything prior to that was other [77] work not on Section A-1 or A-2.

Q. But then, of course, there is included—there would then be in addition to that the travel time and the unloading. Do you know when the travel time and unloading of Dusenberg for instance, ceased?

A. Well, this document just submitted will show the travel time—the end of the travel time. I think it was July 14th.

Q. Well, let me get at it in another way. The \$90,000 which Mr. Sager referred to, which is in the—included in the payroll that was referred to by the Circuit Court of Appeals, that was for actual time out on 1 and 2?       A. Yes.

Q. Yes, and that did not include the travel time and the unloading?       A. No, it did not.

(Testimony of Clifford G. Polk.)

Q. Yes, and it didn't include the maintenance?

A. No.

Mr. Peterson: We thought, your Honor, we might be able to dispose of this matter this afternoon. I seem to have been in accord with Mr. Sager as to what the Court intended us to do.

The Court: Well, I think in clarifying it as you have here, since the witness has been put back on the stand, insofar as the Court is concerned in removing [78] that misapprehension or misunderstanding——

Mr. Peterson: Yes.

The Court: ——I had with reference to the situation there, the matter is virtually to a point of disposition, excepting the matter of calculating the amount that would be due.

Mr. Sager: As I see it, your Honor, there is only one matter left undetermined, and that is due to my misunderstanding of your Honor's statement this morning as to what you had included. I think Mr. Polk can make as good an estimate of the work of Dusenberg and Weldon Brothers in unloading and travel and maintenance as he has with the other contractors, and then I have a similar computation as those admitted for those two contractors. I don't know whether Mr. Peterson has seen them, because we didn't consider them necessary under our interpretation of your Honor's holding this morning, but I have those in the office and can get them. It would put Weldon Brothers and Du-

(Testimony of Clifford G. Polk.)

senberg in exactly the same position as all the other contractors. When they were diverted then their time is no longer attributable to the contract, except, of course, for the month that they actually worked on A-1 and A-2, which is already established.

The Court: That is correct, if I understand [79] you.

Now the month of August—the full month of August, these various employees were all engaged on these—under the contract on this 155 miles of highway.

Mr. Sager: The two—of the two contractors.

The Court: The two contractors.

Mr. Sager: That is right, Dusenberg and Weldon Brothers.

The Court: Well, were there other contractors who had the same status as these two?

Mr. Sager: None of the other contractors ever went on Sections A-1 or A-2, your Honor, or at least during the coverage period, or prior thereto.

The Court: But during the month of July and a part of June, the employees that had been recruited for A-1 and A-2, were diverted to other contractors?

The Witness: To other sections, yes.

The Court: To other sections. Well, of course they could not be at that time, under the holding of the decision here of the Circuit Court could not be calculated as an item chargeable or an item for which the plaintiff would be entitled to recover,

(Testimony of Clifford G. Polk.)

except that part of the decision which indicates that those things which were essential incidents, and that's what caused [80] the difficulty in making a disposition of this case, because it is humanly impossible under conditions that prevailed at that time with a large number of men to say exactly what—who the individuals were and what the items amounted to, but certainly unloading all equipment that was to be used on this job was an essential incident. Certainly maintaining a highway sufficiently passable to transport the equipment to the place where it was to be used was essential, and then, since they were recruited during this period of time following June 17th and were being paid travel time, that was a part of the liability assumed by the insurance company when they wrote the contract, and that's what I'm trying to see if the parties can arrive at, so as to—and then I shall be able to make a finding.

Mr. Sager: I think by my offering these other two summaries of the travel time paid Dusenbergs and Weldon Brothers, and Mr. Polk can estimate there what additional cost there would be on the unloading and transportation and maintenance because of the inclusion of those two contractors, it would fairly well give us the figures.

The Court: It should, but I can readily see the difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insur-



(Testimony of Clifford G. Polk.)

ance premium due and under the holding of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.

Mr. Peterson: Well, now, do I understand that the ruling of the Court is that where men were recruited and proceeded to Gulkana; after arriving there they were diverted to some place other than the 155-mile section; that the plaintiff is entitled to the travel time and the time until such diversion took place?

The Court: Yes, insofar—as—the burden is upon you to establish some amount.

Mr. Peterson: Well, now, your Honor, this calculation which Mr. Sager presented, is I understand, a correct calculation of that travel time until a diversion was directed, because the diversions were all directed after they got into Alaska. Is that correct, Mr. Sager?

Mr. Sager: That is correct. [82]

The Court: The premium can be calculated on that figure then.

Mr. Peterson: Yes.

The Court: And the premium can be calculated upon the second figure as to the August payroll, which is conceded was on the job.

Mr. Peterson: Yes.

(Testimony of Clifford G. Polk.)

The Court: Now, then, we have left only the——

Mr. Peterson: The unloading and the maintenance. I think that we can establish that by Mr. Polk as well as it could be established, anyway, because obviously it is a matter of estimate.

The Court: It appears to the Court that it would have to be such.

Q. Mr. Polk, have you made a checkup and given a careful consideration to the matter of the time consumed and the remuneration earned with respect to unloading equipment at Valdez and moving it into the job? A. Yes, I have.

Q. Yes. Is it possible to determine that accurately? A. No, sir, it is not.

Q. And it can only be arrived at, can it, by an estimate, considering all of the factors?

A. Well, in my opinion it can be.

Q. Yes, and what in your opinion is a proper amount on [83] account of payroll to be allowed for the unloading of the equipment at Valdez and moving it in to Gulkana?

A. Well, the way I arrived at that was this way: I figured that it would take ten per cent of the contractor's crew a period of fifteen days.

Q. And that, considering the rate of pay, what did that amount to in dollars?

A. Roughly, it is around five thousand dollars for both contractors.

Q. But for the entire equipment, was how much? A. Beg your pardon?

(Testimony of Clifford G. Polk.)

Q. For the entire equipment of all contractors moving in? A. \$40,000.

Q. \$40,000, and then for the maintenance of the road in—from Gulkana to Salana, for necessities or supplies to be moved in what did you estimate that entire—how many men did you estimate was required in that maintenance job?

A. I estimated 35 men for the period July 7 to August 31.

Q. That is 54 days, I think? A. Yes.

Q. And your entire computation of that was?

A. \$27,594.

Q. Then I understand you deducted \$5,000 from that figure on account of employees of Weldon Brothers and [84] Dusenbergs, for the reason that their entire personnel was embodied in the payroll which had been presented? A. That is right.

Q. That is right, so that a summary of your figures then is, making allowances for these deductions for Dusenbergs, because their men and Weldon Brothers being included in the payroll which has been presented, your estimate is \$35,000, with respect to the unloading? A. Yes, sir.

Q. And moving in, and \$22,000—\$22,594, with respect to the maintenance incident to Sections 1 and 2 of the so-called—of the road along Section 3?

A. Yes, that's right.

Q. Yes.

The Court: Well, I must confess that I am still confused, particularly on the \$40,000 item. You

(Testimony of Clifford G. Polk.)

said \$40,000 for all contractors. Now do you mean by that——

The Witness: I estimate \$40,000 was the entire cost of unloading all equipment and transporting all equipment.

The Court: Well, was that equipment that was going to be used on Sections 1 and 2, if it hadn't been for the diversion? A. Yes, sir. [85]

The Court: Well, that clears it up. You refer to all contractors and you have these other two sections of the road that is confusing the Court. In this \$5,000 item that you deducted from the forty thousand, is that because it is an included item in the payrolls?

The Witness: Yes, otherwise we would be allowing that payroll twice.

The Court: I see.

Mr. Peterson: And that is true with respect to the maintenance.

The Court: Well, the sum and substance of your testimony is, then, that the sum of \$25,000 plus \$22,594 would represent the amount that would be chargeable as against this insurance premium, or insurance policy.

The Witness: Yes, sir, except the Dusenbergs and Weldon's share of unloading and maintaining has been excluded from those figures.

The Court: Well, that's the \$5,000 that has been excluded in the two items?

The Witness: Yes.

The Court: Well, then, it would follow that the

(Testimony of Clifford G. Polk.)

judgment would be one based upon the amount of the travel time, plus the amount of the unloading and maintenance, plus the month's work during the month of August. [86]

Mr. Sager: That is my understanding now, your Honor, but I will have to supplement the record with the travel time of Dusenbergs and Weldon Brothers. I don't think that is included in that summary.

Mr. Peterson: That—if we are going on estimates, that restores the \$5,000 back into the unloading and the \$5,000 back into the maintenance.

The Court: Well then wouldn't you be duplicating that item?

Mr. Sager: No, we came in here with the idea we were going to use the entire payroll of Weldon Brothers and Dusenbergs. We both understood your Honor to indicate that this morning, whether they were diverted or not, so then we eliminated the Dusenbergs and Weldon Brothers work in transportation and unloading and maintenance, because the entire payroll was already in. Now, however, if your Honor is holding that they are in the same position as other contractors when they were diverted, the time they spent on diverted work is not applicable to the policy, then we treat that the same as the others and we have to show their travel time, plus estimated unloading and transportation, and maintenance. We have got everything in here on that except the travel pay, plus one month's work on the two sections.

(Testimony of Clifford G. Polk.)

The Court: You say everything but the travel time?

Mr. Sager: Yes.

The Court: Well isn't this A-15 the travel time?

Mr. Sager: That doesn't include Dusenbergl and Weldon Brothers. I have to check again to be sure.

The Court: You mean it doesn't include the individuals?

Mr. Sager: That is right.

Mr. Peterson: No, it doesn't include their forces.

Mr. Sager: It includes all the other contractors but Dusenbergl and Weldon Brothers, and I have a similar computation as to those two contractors. I didn't bring them in because——

The Court: Well, weren't all these men recruited to work on sections 1 and 2?

Mr. Sager: They were all recruited under the same contract, yes. The situation is, your Honor, there was one so-called management contract with Lytle and Green. Then there were fourteen other contractors, is that correct?

Mr. Peterson: Yes, that is right.

The Witness: I believe it is thirteen.

Mr. Sager: Fourteen including Lytle & [88] Green. Anyhow, fourteen other so-called unit contractors. They all have a separate contract with the government, but they were under the direction of Lytle & Green, Lytle & Green being the general management contractors.

The Court: And what was the status of Weldon and Dusenbergl?

(Testimony of Clifford G. Polk.)

Mr. Sager: They were some of these unit contractors, the same as all the other thirteen.

The Court: But the whole thirteen were to perform services on sections 1 and 2, and would have performed services if it had not been for the diversion?

Mr. Sager: That is right. At least the contract specifies it was to be on the 155 miles. There is this other element. Each of those contracts provided that they may be assigned to other work, at the discretion of the government, and that's what happened, of course, so that as I stated this morning, whether they were going to Sections A-1 or A-2, or were going to some of the other sections it seems to me is some question, but that is a matter for the Court to determine.

The Court: Well what I would like to have the witness clear up; what was the distinction between Weldon and Dusenberg and the other eleven contractors—subcontractors if you might call them that.

The Witness: There was no distinction at all. They were up there for the same purpose, and Dusenberg has a grading outfit—moves dirt.

The Court: Well, is this the distinction, though, as far as this case is concerned, that it was the Weldon and Dusenberg employees who worked during the month of August on this job?

The Witness: Yes, sir.

The Court: And the other eleven subcontractors did not have their employees on this job?

(Testimony of Clifford G. Polk.)

The Witness: Not on Section A-1 or Section A-2.

Mr. Sager: That is the only reason they are singled out over the others, because they happened to be the two that worked on A-1 and 2.

The Court: But originally the plan was to have them all work on A-1 and A-2?

The Witness: Yes, sir.

Mr. Peterson: Well, now, as I understand this, we have disposed of the travel time of the contractors—of the employees of the contractors other than Dusenberg and Weldon Brothers. That is in evidence, and there is to be supplied, then, the travel time of the employees of Dusenberg and Weldon Brothers, that's correct.

Then there is to be taken into consideration the matter of the unloading of equipment of Dusenberg [90] and Weldon Brothers. That's correct.

Mr. Sager: That is right.

Mr. Peterson: Then there is to be taken into consideration the maintenance feature—those three items.

Now, as I understand then, that—and there is also included the \$90,000 from the 1st of August until the 31st of August, and then there is the short period where they were diverted after arrival to Alaska until August 1st, which must be stricken from these payrolls, under the Court's ruling.

The Court: Yes.

Mr. Sager: That will be determined by adding the ninety thousand plus the estimate of that main-



(Testimony of Clifford G. Polk.)

tenance, transportation and unloading, plus the travel time.

The Court: That is correct, I think.

Mr. Peterson: Yes. If there was some work performed—diverted to some other place up there in the short time between their assembling an outfit there and going on 1 and 2, that will be deleted from the payroll that has been submitted, Exhibit 11 I believe, or 12—it doesn't make any difference.

The Court: Yes. It can be determined with a sufficient degree of certainty.

Mr. Sager: We will have Dusenbergs and Weldon [91] Brothers in exactly the same position as the other contractors. We will show their travel time, and we have already got the \$90,000 figure, which represents the month of August payroll on A-1 and A-2.

Mr. Peterson: Yes.

Mr. Sager: And then he has estimated there additional time for transportation and maintenance.

Mr. Peterson: Well, then we agree that his estimate of \$5,000—\$5,000 with respect to the unloading and the other, that is, restore the unloading to \$40,000 instead of thirty-five, and the maintenance over there to twenty-seven five ninety-four, and that takes care of the two five thousand dollar deductions we made.

Mr. Sager: That's right. These figures then would represent forty thousand, twenty-seven thousand—

Mr. Peterson: Five ninety-four.

Mr. Sager: Would represent it.

(Testimony of Clifford G. Polk.)

The Court: Well, I think we have made some progress, at any rate. It's a very complex situation.

Mr. Peterson: Well, we can probably——

Mr. Sager: May we offer these other documents?

The Court: It might be stipulated that these other documents may be offered in evidence and made a part of the record in this case. [92]

Mr. Sager: The travel time concerning these two contracts.

Mr. Peterson: Yes.

The Court: Very well, and then that is all.

(Whereupon, adjournment was taken at 5:03 o'clock p.m.) [93]

February 3, 1947, 10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

The Court: Docket 556, Hansen & Rowland, Inc., versus C. F. Lytle Company, presentation of findings of fact and conclusions of law.

I understand, gentlemen, the only issue left here is that of interest on the amount.

Mr. Peterson: Your Honor, there was just one matter, I just enquired of Mr. Sager about. Subsequent to the decision of the Circuit Court of Appeals we requested the defendant to provide the payroll broken down. Those were supplied and they are in the possession of Mr. Sager—certified payrolls, and I examined the record here and I think they are not in evidence, your Honor, and I think they should be. I don't know what attitude the

government may take after this findings and judgment are rendered as to another appeal to the Circuit Court of Appeals, but I think those should be a part of the record, your Honor.

The Court: Have any objection, Mr. Sager?

Mr. Sager: Well, I don't know that I have any [94] objection. They are a voluminous lot of documents. We had them here at the original hearing, and I offered them at that time, and Mr. Peterson objected because they would encumber the record, and then we agreed at that time as to the total payroll——

Mr. Peterson: No, I——

Mr. Sager: I mean we agreed that the amount they alleged was one million fifty-five thousand dollars, or whatever it was, was the actual amount shown by those payrolls, so they were not put in evidence. Now I still have them in my file. I don't think that they enter into this issue at the present time.

Mr. Peterson: They may become important in case of an appeal.

Mr. Sager: Well, I anticipate that they may want to urge this provision that they suggest in their brief they are entitled to one-half of something if the payrolls were not properly submitted. If that is true, why then I would resist putting them in because that has no——

The Court: These proposed findings and judgment apparently don't raise that issue, at all.

Mr. Sager: I don't see how they do.

Mr. Peterson: No, we don't raise the issue and

I'll state frankly to the Court that we have no idea of an [95] appeal, but I was somewhat concerned, looking at Mr. Sager's memorandum on this matter of interest, he directed attention to the fact that the figures supplied by Mr. Polk were estimates only, and I am somewhat apprehensive of what may happen in the Circuit Court of Appeals if the government should appeal this case on that feature of the matter.

Mr. Sager: Well, if your Honor——

The Court: Well, if they were identified—I don't know whether they were—they they aren't they maybe given an appropriate marking and made a part of the record.

Mr. Peterson: May they be made a part of exhibit 15, your Honor? That's the last exhibit.

The Court: Yes. Of course if there is some original document that has to be used elsewhere again by the Bureau of Public Roads——

Mr. Sager: Oh, there is no difficulty of that nature. I have certified copies of the payrolls of each contractor.

The Court: Very well.

(Whereupon payrolls referred to were received in evidence and marked exhibit 16.)

The Court: Now you may proceed, Mr. Peterson.

Mr. Peterson: So far as we are concerned, at least, these findings were discussed more or less with Mr. Sager, and finally agreed upon, as I understand, in accordance with a letter which he ad-

dressed to me, and I understand [96] the only question is that of interest.

It's plaintiff's contention that the amount of premiums became due on the cancellation of the policy, September 2, 1942. The matter of determining the amount of premium is only a matter of computation, and this case was tried in 1944. The Court at that time made findings and entered a judgment awarding interest from September 2, 1942, and of course the formula on which the premium was computed was—the Circuit Court of Appeals held was erroneous; that only a part of the items would be used as a basis for premium computation and allowed a partial recovery, but as to two items, Dusenberg and—two contractors, anyway the judgment was affirmed as to those and the matter remanded here to compute the amount due in accordance with their formula. I don't know the formula laid down by the Circuit Court of Appeals, but it became the basis. In any event the money was all due, whatever we were entitled to recover, on September 2nd.

The contract by its terms provided that premiums would be paid every two weeks.

Now there are two reasons we think why the plaintiff is entitled to interest on the amounts which the Court will determine to be due, which is September 2, 1942. First, the decision of this Court and the affirmance of the judgment of this Court by the Circuit Court of Appeals, sustaining [97] the right to interest from September 2, 1942, on the ninety-two thousand dollar item, which your Honor

will remember the Circuit Court of Appeals held was proper to compute premium on, is *stare decisis* of the question. I assumed your Honor has had an opportunity to read our memorandum brief on the matter?

The Court: I have read it carefully, Mr. Peterson and likewise the briefs submitted by the defendant here.

Mr. Peterson: In view of your Honor's statement, I won't pursue the matter further. I think clearly that we are entitled to interest because the decision of the Court settles that question, and because, without regard to the decision of the Court, the amount of the premium can be determined by computation.

The Court: Well, that is a matter that is troubling me. I am conscious of the fact that I allowed interest before, but I question very much whether the Circuit Court passed upon that as an issue, at all. The first paragraph is a mere recital of the judgment from which the appeal is taken, but no consideration given to the issue of interest. The first case was tried upon—or at least at the beginning of the trial, upon the theory that it was an account stated, and of course if it were an account stated, interest would be [98] allowed. However, after the issues were made and we commenced taking testimony we tried the case upon the theory as to what was actually due, rather than it being an account stated.

Now, then, it came back here for trial with specific directions to take testimony as to what amount

was due, and that being true the general rule is that interest can not be allowed upon a claim where evidence must be taken to ascertain the amount of it, because it is a non-liquidated claim.

Mr. Peterson: Oh, I think your Honor fails to mark the distinction in the cases. It appears to me the logical and common sense of the proposition is stated in the case of Sullivan against Millan in the 19th Southern, cited in my brief (reading citation).

(Thereupon argument continued.)

The Court: I think I shall have to deny interest and allow you an exception, and I think that if you want to take that question on to the Circuit Court you might stipulate facts and not take this whole record up again.

Mr. Peterson: Take it up on a short statement of facts.

The Court: And otherwise if you are in accord I will sign the judgment and findings as submitted.

Mr. Sager: The amount in the judgment we do not object to.

The Court: I will have to strike therefrom the interest unless you want, Mr. Peterson, to prepare another judgment and findings, why I will give you an opportunity to do that. Of course there are no exceptions saved in this one.

Mr. Peterson: I think probably we can—have you the findings before you, your Honor?

The Court: Yes, and the judgment, also.

Mr. Peterson: If you will turn to the findings, may I suggest that you delete “with interest there-

on at the rate of six per cent per annum from September 1st, 194——”

The Court: Where are you reading from?

Mr. Peterson: The last page of the findings.

Mr. Sager: Of the conclusions?

Mr. Peterson: Or of the conclusions, yes, I beg your pardon.

The Court: I didn't intend to have these original documents filed, but they are marked "filed" now. I just meant to have them placed in the file. They are labeled additional findings of fact and conclusions?

Mr. Peterson: Yes.—No,

The Court: Well those are the findings you refer [100] to in the conclusions?

Mr. Peterson: Yes, Your Honor, the conclusions, forty-nine hundred and four ten due.

The Court: I think I better take these out and pass them back to you.

Mr. Peterson: Yes, and then shall I rewrite it, Your Honor? The last page?

The Court: I think perhaps you should and then you can save such exceptions as you wish.

Mr. Peterson: If I may have the originals. It is understood now that I will rewrite the last page of the judgment, deleting——

The Court: And you may save your exceptions and a place for the defendant to except, likewise.

Mr. Sager: I think the defendant should except because of the question of appeal being determined by the department, the department would like to save exceptions to the findings.



The Court: Then you may, after you have agreed upon them, just submit them and I will sign them at any time. You need not make an appearance.

(Whereupon, adjournment.)

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### CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter.

[Endorsed]: Filed April 24, 1947.

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[Endorsed]: No. 11639. United States Circuit Court of Appeals for the Ninth Circuit. Hansen & Rowland, Inc., a corporation, Appellant, vs. C. F. Lytle Company, Inc., a corporation, and Green Construction Company, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed May 28, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11639

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,

Appellants,

vs.

HANSEN & ROWLAND, INC., a corporation,  
Appellee.

STIPULATION AS TO RECORD

Whereas, the United States Circuit Court of Appeals for the Ninth Circuit rendered its decision in the above entitled cause on October 31, 1945, by which decision the judgment of the lower court was in some respects reversed and the cause remanded to the District Court of the United States for the Western District of Washington, Southern Division, for further proceedings, and

Whereas, a further hearing in said cause was had pursuant to the said opinion and mandate of the United States Circuit Court of Appeals for the Ninth Circuit, and at the conclusion thereof a final judgment was rendered by said District Court of the United States for the Western District of Washington, Southern Division, on February 4, 1947, and Hansen & Rowland, Inc., a corporation,

Appellee, in the above entitled cause, feeling aggrieved at the decision and final judgment of the said District Court of the United States for the Western District of Washington, Southern Division, rendered on the 4th day of February, 1947, has served and filed a Notice of Appeal from said final judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and to the end that said Appeal may be presented and fully considered by the United States Circuit Court of Appeals for the Ninth Circuit, the parties hereto hereby stipulate and agree that the matters and proceedings set forth in the printed Transcript of Record herein, together with certain of the Exhibits referred to therein, are material to a consideration of said Second appeal from said final judgment of said District Court of February 4, 1947, and to the end said printed Transcript of Record heretofore filed in this cause may be made a part of the record on said appeal, the parties hereto stipulate and agree that said Transcript of Record, including the Exhibits, made a part thereof and referred to therein, together with a copy of the further proceedings had before the said District Court, resulting in said judgment of February 4, 1947, together with Exhibits introduced therein, may, subject to the approval of this Court, be made a part of the record herein, it is further stipulated and agreed that the making of this stipulation does not foreclose either party hereto from designating portions and parts of the record of the further proceedings

herein resulting in the final judgment of February 4, 1947.

Dated this 24th day of April, 1947.

/s/ JAMES L. CONLEY,  
PETERSON & DUNCAN,  
Attorneys for Appellant.

/s/ J. CHARLES DENNIS,  
/s/ HARRY SAGER,  
Attorneys for Appellee.

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[Title of Circuit Court of Appeals and Cause.]

### ORDER

It appearing to the court from the written stipulation of the attorneys of records for the parties hereto, that pursuant to the opinion and mandate of this court rendered on the 31st day of October, 1945, a further hearing of this cause was had before the District Court of the United States for the Western District of Washington, Southern Division, and that said court rendered a final judgment pursuant to said further hearing on February 4, 1947, and that Hansen & Rowland Inc., a corporation. Appellees, above named, has appealed from said final judgment to this court, and the parties hereto having agreed that the printed Transcript of Record in this cause, together with the Exhibits set forth and referred to therein, and all proceedings incident thereto are material and proper to be considered on said appeal of Hansen & Rowland, Inc., a corporation, from the final judgment of the District

Court of the United States for the Western District of Washington, Southern Division, entered herein on February 4, 1947, the court doth now order that said printed record, together with exhibits described and referred to therein may be made a part of the record on said Second Appeal.

Dated April 25, 1947.

/s/ WILLIAM DENMAN,  
United States Circuit Judge.

Presented in behalf of Peterson & Duncan, Attorneys for Hansen & Rowland, Inc.

/s/ WENDELL W. DUNCAN,

Approved:

/s/ HARRY SAGER,  
Of Counsel for Appellants.

[Endorsed]: Filed April 25, 1947.

---

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT (PLAINTIFF) INTENDS TO RELY ON APPEAL.

(Second Appeal)

Appellant (Plaintiff), intends to, and will, rely on the following points to effect a reversal of the judgment entered in above cause by the trial court on February 4, 1947, to wit:

1. The Trial Court committed reversible error

in ruling that the burden was on Plaintiff to establish the amount of remuneration paid employees by defendants, on which premiums were to be computed, the effect of which ruling impaired the contract between the parties which provides:

“The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.”

\* \* \* \* \*

“The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.

“It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms,

conditions, agreements or declarations of the undermentioned policy, other than as above stated.”

Original Trans. Record pp 73, 74 and 77.

2. Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to certain work subject to premium charge, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each sub contractor as shown by the payrolls, Exhibit 16, as required by the provisions of the insurance contract, to-wit:

“If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor’s or sub-contractor’s employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.”

3. Notwithstanding the legal basis for the computations of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of

exact determination by computation and bears interest from that date.

4. Appellant (Plaintiff) is entitled to interest at the legal rate from September 1st, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (original Trans. p. 31), which is *res adjudicata* on the question of interest. (That part of the judgment not being reversed by this Court.)

/s/ JAMES L. CONLEY,  
/s/ CHARLES T. PETERSON,  
PETERSON & DUNCAN,  
Attorneys for Appellant.

Received copy of the foregoing Statement of Points on which Appellant (Plaintiff) Intends to Rely on Appeal, this 23rd day of April, 1947.

/s/ HARRY SAGER,  
Attorneys for Defendants.

[Endorsed]: Filed May 28, 1947.

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[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS  
OF RECORD TO BE PRINTED

(Second Appeal)

Come now Plaintiff appellants, and herewith designate to be printed the following portions and parts of the record on appeal, which they think necessary for the consideration thereof:



1. Additional Findings of Fact and Conclusions of Law filed herein on February 4, 1947.
2. Judgment filed herein on February 4, 1947.
3. Notice of Appeal.
4. Bond on Appeal.
5. Transcript of Testimony.
6. Stipulation of Parties Regarding Original Record.
7. Order of Circuit of Appeals re Original Record.
8. Statement of Points on which Appellant intends to rely on Appeal.
9. Order for Clerk to Transmit Original Exhibits to Circuit of Appeals.
10. Designation of Parts of Record to be printed (Appellants).

Dated this 28th day of April, 1947.

PETERSON & DUNCAN,  
/s/ JAMES L. CONLEY,  
Attorneys for Plaintiff  
Appellant.

Copy of the foregoing Appellant's Designation of Parts of Record to Be Printed, received this 28th day of April, 1947.

/s/ J. CHARLES DENNIS,  
/s/ HARRY SAGER,  
Attorneys for Appellee.

[Endorsed]: Filed May 28, 1947.



United States  
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY, a  
Corporation,

*Appellee,*

vs.

HANSEN & ROWLAND, INC., a corporation,

*Appellant.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

**BRIEF OF APPELLANT**

CHARLES T. PETERSON  
PETERSON & DUNCAN  
520 Perkins Building  
Tacoma, Washington

**FILED**

AUG 17 1947

JAMES L. CONLEY  
Porter Building  
Portland, Oregon

PAUL P. O'BRIEN, *Attorneys for Appellant.*



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---

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**BRIEF OF APPELLANT**

---

JURISDICTION

Appellant filed a complaint in the Superior Court of the State of Washington for Pierce County on August 5, 1943 (Tr. 7) in which it sought recovery from defendants of an insurance premium in the amount of \$16,153.73 (Tr. 2-7). It appears from the complaint

that plaintiff is a Washington corporation, a resident and citizen of the State of Washington; that defendants are Iowa corporations, residents and citizens of the State of Iowa. The cause was removed (Tr. 15) to the United States District Court for the Western District of Washington, Southern Division, upon petition for removal (Tr. 9), pursuant to 28 U.S.C., Section 71. The District Court had jurisdiction of the cause by virtue of 28 U.S.C. 41 (Tr. 1). After trial the lower court awarded judgment to plaintiff against defendants in the amount of \$16,153.73, and for costs, which judgment was on appeal reversed by this court (151 Fed. (2d) 573). The cause came on for further hearing pursuant to the opinion and mandate of this court, resulting in the trial court entering final judgment on February 4, 1947 in favor of appellant and against appellees in the amount of \$4,904.10, together with costs of suit in the amount of \$94.00 (Tr. 473-4). On April 23, 1947 and within ninety days following the entry of said judgment, Hansen & Rowland, Inc., Appellant, served and filed its Notice of Appeal from said judgment (Tr. 475-6) (U.S.C.A. Title 28, Section 230). The amount in controversy on this appeal is in excess of \$3,000.00, exclusive of costs (Tr. p. 2) (U.S.C.A. Title 28, Section 231). On the same date appellant filed its cost bond on appeal in the amount of \$1,000.00, conditioned as required by Federal Rules of Civil Procedure (Rules 73, Section 3). Copy of appeal bond executed by Maryland Casualty Company, a corporation, as surety, together with notice of filing of same was served on opposing counsel on April 23, 1947.

## STATEMENT OF CASE PLEADINGS

The complaint alleges that Phoenix Indemnity Company, assignor of plaintiff, issued to defendants a certain policy of liability insurance effective June 17, 1942 (Tr. 72) for an agreed premium at the rate of 85c for each \$100.00 of wages paid to employees of appellees and their associated contractors (fifteen in number), in connection with the performance of certain work to be done on the Alaska Highway; that during the period the policy was in force from June 17, 1942 to September 1, 1942, the total wages paid amounted to \$1,055,214.02; that because defendants cancelled the policy, plaintiff became entitled to premium on short-rate basis amounting to \$16,153.73 (Tr. 2-6). Defendants answered denying anything due in excess of the amount of \$8.59 (Second Amended Answer, Tr. 18).

## FACTS

The policy was issued indemnifying defendants against legal liability for personal and property damage with respect to work performed on sections described as "A-1 and A-2", being 155 miles of highway in Alaska extending from the Canada border to a town called Slana. Work was also performed on three other sections, Richardson Highway, Section A-3, Section A-4 (Map Tr. p. 278 (Tr. 503-506)). By its decision (151 Fed (2d) 573) this court held in substance that the work done not in connection with Sections A-1 and A-2 did not come within the policy coverage and the

payrolls incident to work not connected with Sections A-1 and A-2 could not be used as a part of the premium base. In this connection this court said:

\* \* \*“and it plainly appears that it was not done in connection with the construction of the latter sections as might have been the case if for example, it had been done so that A-4 might be used for necessary transmission of A-1 and A-2 supplies.”

Defendant's witness, Mr. Polk, resident engineer for the government (Tr. 501) the only witness testifying at the further hearing, testified that all equipment was assembled at Valdez, where it was unloaded from vessels and then taken overland to Gulkana (Tr. 510) and they improved Richardson Highway, over which they had to bring in their equipment and supplies (Tr. 503) which was an existing road connecting Valdez and Gulkana. All of the employees and equipment went to Alaska in connection with the initial construction of Sections A-1 and A-2, the 155-mile section (Tr. 549-550) and after they arrived at Gulkana the workmen with their equipment were then assigned to different sections of work (Tr. 533; Tr. 540; Tr. 544; Tr. 550; Tr. 554; Tr. 562). Shortly after the arrival of outfits in Alaska they were ordered to assist in opening up the trail road, part of the 155-mile area (Tr. 513). Between June and August the trail road (Section A-3) was not readily passable and it was necessary to keep quite a large maintenance crew on that all of the time (Tr. 524). It was a mixture of a lot of men, a few from every organization for a while (Tr. 525, Tr. 544). It

was necessary to improve and maintain Section A-3 in order to reach Sections A-1 and A-2, the 155-mile section (Tr. 557). The construction of the main camp was started on July 7, and at the same time they started work on Section A-3 by using hand tools (Tr. 506-507) as well as working on Richardson Highway (Tr. 509). No evidence was offered as to the amount of pay roll on Richardson Highway necessary for the movement of men and equipment.

The trial court made the following Findings of Fact:

### “III.

That between the 17th day of June, 1942, and the 31st day of August, 1942, workmen and employees of Defendants and the various unit contractors named in the insurance policy, Exhibit 4 herein, on which premiums are claimed, performed work and labor on a section of the highway known as Section A-3, between Gulkana and Slana, Alaska, for the purpose of, and necessary to enable workmen and equipment to reach said sections A-1 and A-2, and necessary for the transmission of supplies to said sections A-1 and A-2 of said highway, and without (2) which work and labor said sections could not be reached. That with the remuneration earned by employees of plaintiff and of said unit contractors in the performance of said work was and is the sum of \$27,594.00.” (Finding III Tr. 470)

The trial court summarized its duty in the following language:

“The Court: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that

I (70) am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections—that's 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract." (Tr. 545)

In the course of its opinion this court said:

\* \* \* "An issue appears to be presented as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues as may be necessary for the entry of a judgment for premiums due in conformity with the views herein expressed<sup>1</sup> as to the policy's coverage limitation." (Op. p. 577)

During the course of the hearing the following occurred (Tr. 533):

"Mr. Peterson: Do I understand that when these contractors came up there on the job, then they were assigned to some particular section?

The Witness: Yes, sir.

Mr. Peterson: Yes, and that was after arrival there?

The Witness: Yes, although some of these outfits didn't get in until very late.



The Court: I understand, but after they arrived there then you assigned them to a job? (56)

The Witness: Yes.

### Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, do I understand that after the contractors got up there, we will say the Western Construction Company (75) after they arrived there then you assigned them to some other section, is that the way it was done?

A. Yes, that's it.

Q. Now, this computation, I understand that is being offered here this uncertified computation, covers the transportation or the travel time probably more correctly, of the employees going up there with respect to Sections 1 and 2, that's correct, is it not, under the primary contract?

A. Yes, I think that is true.

Q. And after they arrived there then they were diverted to these other sections, Richardson Highway and 3 and 4?

A. Yes.

Q. That's the way it happened?

A. That's the way it happened. \* \* \*  
(Tr. 549-550).

Q. Mr. Polk, have you made a checkup and given a careful consideration to the matter of the time consumed and the remuneration earned with respect to unloading equipment at Valdez and moving it into the job? A. Yes, I Have.

Q. Yes. Is it possible to determine that accurately?

A. No, sir, it is not.

Q. And it can only be arrived at, can it, by an estimate, considering all of the factors?

A. Well, in my opinion it can be.

Q. Yes, and what in your opinion is a proper amount on (83) account of payroll to be allowed for the unloading of the equipment at Valdez and moving it in to Gulkana?

A. Well, the way I arrived at that was this way: I figured that it would take ten per cent of the contractor's crew a period of fifteen days.

Q. And that, considering the rate of pay, what did that amount to in dollars?

Roughly, it is around five thousand dollars for both contractors.

Q. But for the entire equipment, was how much?

Q. For the entire equipment of all contractors moving in? A. \$40,000.

Q. \$40,000, and then for the maintenance of the road in—from Gulkana to Salana, for necessities or supplies to be moved in what did you estimate that entire—how many men did you estimate was required in that maintenance job?

A. I estimated 35 men for the period July 7 to August 31.

Q. That is 54 days, I think. A. Yes.

Q. And your entire computation of that was?

A. \$27,954.

Q. Then I understand you deducted \$5,000 from that figure on account of employees of Weldon Brothers and (84) Dusenbergs, for the reason that their entire personnel was embodied in the payroll which had been presented?

A. That is right.

Q. That is right, so that a summary of your figures then is, making allowances for these deductions for Dusenbergs, because their men and Weldon Brothers being included in the payroll which has been presented, your estimate is \$35,000, with respect to the unloading?

A. Yes, sir.

Q. And moving in, and \$22,000 - \$22,594, with respect to the maintenance incident to Sections 1 and 2 of the so-called—of the road along Section 3?

A. Yes, that's right.

The Court: Well, I must confess that I am still confused, particularly on the \$40,000 item. You said \$40,000 for all contractors. Now do you mean by that—

The Witness: I estimate \$40,000 was the entire cost of unloading all equipment and transporting all equipment.

The Court: Well, was that equipment that was going to be used on Sections 1 and 2, if it hadn't been for the diversion?

A. Yes, sir. (85)

The Court: Well, that clears it up. You refer to all contractors and you have these other two sections of the road that is confusing the Court. In this \$5,000 item that you deducted from the forty thousand, is that because it is an included item in the payrolls?

The Witness: Yes, otherwise we would be allowing that payroll twice.

The Court: I see.

Mr. Peterson: And that is true with respect to the maintenance.

The Court: Well, the sum and substance of your testimony is, then, that the sum of \$25,000 plus

\$22,594 would represent the amount that would be chargeable as against this insurance premium, or insurance policy.

The Witness: Yes, sir, except the Dusenbergs and Weldon's share of unloading and maintaining has been excluded from those figures.

The Court: Well, that's the \$5,000 that has been excluded in the two items?

The Witness: Yes.

The Court: Well, then, it would follow that the judgment would be one based upon the amount of the travel time, plus the amount of the unloading and maintenance, plus the month's work during the month of August, (86).

Mr. Sager: That is my understanding now, your Honor, but I will have to supplement the record with the travel time of Dusenbergs and Weldon Brothers. I don't think that is included in that summary."

(Tr. 556-559).

In this connection the court made Finding of Fact No. 5 as follows:

## V.

That the remuneration earned by the employees of Defendants and the employees of the unit contractors named in said policy of insurance between the effective date of said policy of insurance, June 17th, 1942, and the effective date of cancellation thereof, Sept. 1st, 1942, was and is as follows: Travel time of employees and work in unloading and moving equipment directly connected with the performance of the contract on Sections A-1 and A-2 of said Alaska Highway, \$202,882.68, which remuneration was earned by said employees prior to their assignments to other sections or areas; remuneration earned by employees of De-

endants and said unit price contractors named in said policy of insurance between June 17, 1942 and August 31, 1942, necessary for the movement of equipment, employees and transmission of supplies to Sections A-1 and A-2 of said highway, \$27,594.00; remuneration paid by Weldon Bros. and E. M. Dusenber, Inc., to laborers employed directly on Sections A-1 and A-2 during the month of August, 1942, \$90,053.81—total, \$320,530.49. That based on the premium rate on account of earned payroll, or remuneration of the employees of Defendants and associate unit contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and (3) procedure was and is \$4,904.10.  
(Tr. 470-471)

This court in its opinion allowed the payroll items of Weldon Bros. and Dusenber Co. Inc., in the amount of \$90,053.81 to stand as a proper charge on which premium was to be computed.

With respect to the matter of burden of proof, the following took place:

Mr. Peterson: Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.

The Court: That's the reason if the parties are advised of what the Court's position in the matter of law is going to be you ought to be able to work that out, and it's very clear that this case can only be finally disposed of on the matter of dollars and cents, by some fair, reasonable and logical compromise, because there is no possibility of definitely ascertaining what the wages were of each of these various men who no one knows how, hardly where they could be found or who they are, and -----

Mr. Sager: If your Honor please, we have the payrolls and I have a summary which I have submitted to (50) counsel -----

The Court: Sure, but the payrolls have become so jumbled, insofar as the law has been announced here by the Circuit Court. If you pin yourself down to just work done on these two sections in this period of about sixty-five or seventy days, that would be a very simple matter, but unfortunately the Court has seen fit to inject another element into this case. This Court tried the case upon the basis of the payrolls submitted in accordance with the insurance contract. The Circuit Court now calls for a different determination, and it might be a question as to where the burden rests, but it seems to me that if you do not approach this with some spirit of compromise it is very evident to this Court now that more than the payroll of two contractors, who stood around there or sat around there, or what they did, on Sections one and two, for a period of sixty or seventy-five days, is involved in this case. It's more than that amount. (Tr. 527-528)

The court finally ruled that the burden of proof was on plaintiff to establish the amount of remuneration. The following occurred:

The Court: It should, but I can readily see the

difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insurance premium due and under the holding of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.  
(Tr. 554-555)

Mr. Polk testified there was no way of determining actual and accurate payrolls of the men unloading equipment, (Tr. 540) and the witness arrived at the payroll or remuneration paid, labor for unloading equipment and maintenance of Section A-3 and transmission of supplies and equipment to Sections A-1 and A-2 (155-mile limit) by estimates. (Tr. 542, Tr. 550, Tr. 556, Tr. 557, Tr. 558).

The insurance contract involved contains, among others, the following provisions:

"The name insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct." (Tr. 1 pp. 73-74)

"It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured

shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

“Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.” (Tr. p. 77)

\* \* \* \* \*

“If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using a remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.” (Tr. p. 83)

The travel time of employees of Horrabin Construction Company, et al, other than Weldon Bros. and Dusenbergl Co., Inc. was \$137,932.90 (Exhibit A-15, Tr. p. 539). The travel time of employees of Weldon Bros. & Dusenbergl Co., Inc. was \$24,949.88, (Exhibit A-16, Tr. pp. 551, 562, 566). The total remuneration paid by assured to workmen on the Alaska project from June 17, 1942 to August 31, 1942, inclusive, was \$1,055,214.02 (Tr. 161 and 449). The trial court found that \$320,530.49 of the total amount was on account of remuneration on which premiums were payable, in accordance with the formula laid down by this court. (Tr. 470-471). In arriving at this amount the trial



court took into consideration an estimate of Mr. Polk, appellee's witness, that \$40,000 was a proper amount of payroll for handling, unloading and moving equipment into the job before the workmen were assigned to sections other than A-1 and A-2, and also took into consideration an estimate by the same witness that \$27,594.00 was a proper amount of payroll to be allowed for the necessary opening up and maintaining of Section A-3 of the road for the purpose of moving and transmitting equipment and supplies to Sections A-1 and A-2 (the 155-mile section) of said road. Appellant concedes that the items travel time of Horrabin Construction Co., et al, employees \$137,932.90, and travel time of employees of Weldon Bros. and Dusen-berg Co., Inc. \$24,949.88, and labor performed by same parties between August 1st and August 31st of \$90,-053.81 of employees working on Sections A-1 and A-2, making a total of \$252,936.59, are proper items, on which to base premium computation, but contend that under the contract between the parties there should also be included as a base for premium computation 50% of the balance of the total payroll, that is, 50% of \$1,055,214.02, less the conceded items of \$252,-936.59, or the sum of \$401,138.71, since members of all of the crews of the different sub or unit contractors worked at different times at handling, unloading and moving equipment and at opening up and maintaining the section of highway A-3 for the purpose of moving and transporting equipment and supplies to Sections A-1 and A-2, (Tr P544) and that the trial court had

no right to substitute estimates of an interested witness for actual figures, nor to disregard the fact that work was necessarily done and payroll incurred on Richardson Highway for the purpose of moving men and equipment from Valdez to Gulkana before any diversion occurred.

Other questions will be referred to and discussed on the following pages.

### ASSIGNMENT AND SPECIFICATIONS OF ERRORS RELIED ON BY APPELLANT

1. The Trial Court committed reversible error in ruling that the burden was on plaintiff to establish the amount of remuneration paid employees by defendants, on which premiums were to be computed, the effect of which ruling impaired the contract between the parties which provides:

“The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.”

\* \* \* \* \*

“The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.

“It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and

that immediately after the expiration of each period of One Month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

“Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.” (Tr. 1. 73, 74 & 77)

2. Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to handling, unloading and moving equipment, and opening and maintaining section of highway A-3, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each sub-contractor as shown by the payrolls, Exhibit 16, as required by the provisions of the insurance contract, to-wit:

“If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration is such contractor’s or sub-contractor’s employees is not respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.” (Tr. p. 83) (Tr. p. 577)

3. Notwithstanding the legal basis for the computation of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of exact determination by computation and bears interest from that date. (Tr. p. 567)

4. Appellant (Plaintiff) is entitled to interest at the legal rate from September 1, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (Trans. P. 31), which is *res adjudicata* on the question of interest. (That part of the judgment not being reversed by this Court). (Tr. p. 567)

## ARGUMENT

Specification of Error No. 1 is directed to the error of the court in ruling as a matter of law that the burden was on appellant to establish the amount of remuneration paid employees by defendants on which premiums were to be computed. At the threshold of the case the following occurred:

“THE COURT: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I am impelled to find that the insurance rates should be calculated upon all employees, or their wages that they received in working on the two sections—that’s 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these

same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract." (Tr. p. 545)

\* \* \* \* \*

"MR. PETERSON: 'Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as Your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.'" (Tr. p. 527)

\* \* \* \* \*

"MR. SAGER: I think by my offering these other two summaries of the travel time paid Dusenbergh and Weldon Brothers, and Mr. Polk can estimate there what additional cost there would be on the unloading and transportation and maintenance because of the inclusion of those two contractors, it would fairly well give us the figures.

"THE COURT: It should, but I can readily see the difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insurance premium due and under the holding

of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.

“MR. PETERSON: Well, now, do I understand that the ruling of the Court is that weher men were recruited and proceeded to Gulkana; after arriving there they were diverted to some other than the 155-mile section; that the plaintiff is entitled to the travel time and the time until such diversion took place?

“THE COURT: Yes, insofar as—the burden is upon you to establish some amount.” (Tr. 554-5)

The appellant had the right to stand on its contract. That defendants recognized that the duty devolved upon them to furnish the information is evidenced by the fact that they did so. (See plaintiff's Exhibit 6, Tr. pp. 92-4; Exhibit 7, Tr. p. 99; Plaintiff's Exhibit 8, Tr. pp. 101-3; Plaintiff's Exhibit 9, Tr. pp. 104-5; Plaintiff's Exhibit 17, Tr. pp. 429 to 433, inc.)

The fact that this court disagreed with the lower court with respect to the working areas with respect to which payrolls applied, in nowise changed or effected tthe rights of the parties under the contract. It was still the duty of defendants to provide the payroll information under the terms of the insurance contract, and even had no contract been in existence the situation and circumstances surrounding the parties imposed that burden on the defendants. They had originally

submitted payroll statements showing that remuneration paid subject to premium payment was \$1,055,-215.02. The figures are embodied in exhibits above referred to and in addition thereto Exhibit No. 10 (Tr. 1, p. 158), which defendants claim was a mistake (Second Amended Answer, Tr. 1, p. 18).

The pleadings were not recast for the further hearing; consequently it proceeded on the original pleadings insofar as the same were applicable under the decision of this court. Plaintiff proved the amount of remuneration paid during the entire policy period. This, under the pleadings and on the record and under the contract between the parties, required defendants to repel what had been proven with excuse or explanation, and to show clearly and distinctly the portion of remuneration paid on work performed which did not come within the policy coverage. A balancing of convenience or of the opportunities for knowledge based upon a common sense estimate of fairness or of facilities to know the facts and to make proof, placed the burden on the defendants independent of contract, since it would not subject the defendants to hardship or oppression, but on the other hand, if the burden were imposed on plaintiff, it would be subjected to the most severe hardship and oppression because of the fact that defendants in charge of the work, kept the time of the employees, issued the pay checks or requisition for the pay checks, made up and certified the payrolls, which at all times were and presumably still are in the possession of or under the control of the defendants.

Cases recognizing these principles are legion. (See *Williams v. United States*, 135 Fed. 2d 81 and cases cited).

This court recognized the principle in *Giacolene v. United States* (in which the writer of this brief was of counsel), 13 Fed. 2d 108, and again in *McCurry v. United States*, 281 Fed. 532.

## SPECIFICATION OF ERROR NO. 2

“Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to certain work subject to premium charge, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each subcontractor as shown by the payrolls, Exhibit 16, as required by the provision of the insurance contract, to-wit:

“ ‘If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor’s or sub-contractor’s employees is not available to the Company, the earned premium as respects such contractors or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.’ ” (Tr. p. 577)

That an insurance company, like any other litigant, is entitled to have its contract reasonably interpreted in accord with the apparent object and intention of the parts, is so elementary and fundamentally



sound that the citation of authorities appears unnecessary. If, however, it is considered necessary to cite cases in support of so simple a proposition, the following may be consulted: *Hocking v. British American Assurance Co.* 62 Wash. 73, 113 Pac. 259; *Mountain Timber Co. v. Lumber Insurance Co.*, 99 Wash. 243, 169 Pac. 591; *Isaacson Iron Works v. Ocean Accident & Guarantee Corporation*, 191 Wash. 221, 70 Pac. 2d 1026; *Viking Automatic Sprinkling Co. v. Pacific Indemnity Co.*, 19 Wash. 2d 294, 142 Pac. 2d 394.

In *Income Properties Inv. Corp. v. Trefethen*. 155 Wash. 493, 284 Pac. 782, the Supreme Court of the State of Washington said:

\* \* \* "When parties deliberately enter into a contract which is valid in all respects, we have, with almost unvarying uniformity, followed the principle that the provisions of such contracts should be enforced. See *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078; *Heaton v. Smith*, 134 Wash. 540, 235 Pac. 958. To the same effect is the decision of the United States Supreme Court in the *Henderson* case, *infra*."

The late Justice Fullerton of the Supreme Court of Washington in the cited case, *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078, made observations strikingly pertinent here. The court said:

"The trial judge ruled as he did on the principal question because of the clause in the contract above quoted. He held that since the parties had contracted that for any delay caused the appellant by the 'act, neglect, delay or default . . . of any other

contractor,' additional time should be given him for the completion of the work, that this marked the extent of appellant's remedy for such act or default.

"It seems to us that this conclusion is sound. For conditions which arise in the execution of a contract and for which the contract itself makes no provision, the courts are at liberty to apply the ordinary legal remedies when these conditions become a subject of controversy between the contractors, but where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion. So in this case since the parties foresaw that the appellant might be delayed in the execution of his part of the work by the failure of the party having the contract for the plumbing and heating plant to perform its work on time, and provided in the contract that the remedy therefor should be an extension of time on his part to perform the work, the presumption arises that this was intended to measure the rights of the contractor thereunder. Is there anything in the contract itself or in the circumstances surrounding it, that precludes the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary building contract, in which the parties undertook to put in writing all of their rights and liabilities thereunder. It provided for every condition that could arising in its execution, leaving nothing to surmise or inference, and we think it must be held to contain the entire agreement."

Paraphrasing the language of the court in the Goss case, the parties here foresaw that appellees might fail to maintain records necessary for correct premium computation and fail to render correct statements thereof to insurer, and might fail to make available to insurer the correct amount of remuneration paid by other contractors subject to premium charge, and expressly provided in the contract in plain, simple language that the remedy for such a failure should be a computation based on 50% of the entire contract or sub-contract. If there anything to be found in the contract itself or in circumstances surrounding it that precluded the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary insurance contract in which the parties undertook to put in writing a statement of all of their rights and liabilities thereunder regarding premiums. It provided for the very condition which arose, leaving nothing to surmise or inference. There is no mistake as to the full amount of remuneration paid in connection with the job. We are asked to disregard the written contract and to accept defendant's estimates and guess-work,—the very contingency which was foreseen and provided against. It appears to us that the court has no alternative, under the circumstances shown here, but is duty bound to give effect to the contract of the parties.

It appears perfectly clear that the provision of the contract quoted was the result of past experience

in writing insurance of this type. If there be any purpose in parties reducing their contracts to writing, and any virtue in such contracts after they are reduced to writing, appellant is entitled to the benefit of this provision. The probability of the happening of such a condition had been foreseen and a remedy provided for its happening. It is made clear by the provision of the contract, that if the proper payroll and remuneration information and statements were not furnished on which to compute premiums, that then 50% of the entire contract price should be taken as the amount for premium base. Mr. Polk may be a man of probity; he is at best an interested witness, and it may be that his estimates of \$40,000 and \$27,594.00, are reasonably accurate. These circumstances, however, do not afford any reason for a court remaking the contract of the parties which is plain and unambiguous, and substituting something else in place of that which the parties themselves agreed to. *Income Properties Inv. Corp. vs. Trefethen, supra.*

We submit that the total remuneration on which premiums should be computed is properly arrived at as follows: Total travel time, \$162,882.68; remuneration paid by E. N. Dusenbergl, Inc., and Weldon Bros., \$90,053.81; total \$252,936.49, which amount, deducted from 1,055,214.02, leaves a balance of \$802,277.53, 50% of which would be \$401,138.76, to which amount should be added \$252,936.49, making a total of \$654,-075.25, on which the premium arrived at on the short-rate basis should be computed. The result would be \$10,193.20 due as of September 2, 1942.

## INTEREST

Specification of Error No. 3 as follows:

“Notwithstanding the legal basis for the computation of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of exact determination by computation and bears interest from that date.” (Tr. p. 577)

presents the question of right to interest without regard to the question of *res adjudicata* raised in Specification of Error No. 4. The trial court by its judgment denied the recovery of interest from September 1, 1942, the date of the cancellation of the policy (See Judgment, Tr. p. 473). It will be noted that the contract by its terms fixes the price of the insurance at 85c per \$100.00 on all remuneration paid employees. (Tr. p. 84) Obviously, the amount of premium could be arrived at by multiplying the amount of remuneration paid according to defendant's records by the rate. The contract provided that the defendants would maintain proper records and provide correct statements necessary for premium computation, (Tr. p. 74) and would make premium payments immediately after the expiration of each month from date of policy, rendering with the payment a written statement of the amount of remuneration paid employees. (Tr. p. 77)

We, therefore, have a situation where the agreed price of the insurance times the amount of the applicable payrolls would indicate the amount due, the time of payment of which was fixed at the end of each

monthly period. The question of reasonable value was not involved. If there arose in the case a question as to whether or not the payroll from a certain area was subject to premium payment, that circumstance alone did not bring the account within the category of an unliquidated demand for the purpose of computing interest. An identical question arose in the case of *Empire State Surety Co. vs. Moran Bros. Co.*, 71 Wash. 171, 127 Pac. 1104. The facts in that case, as shown by the opinion, parallel the facts in this case. As appears from the statement by the court, the Surety company brought action to recover a balance claimed to be due as premiums upon three insurance policies issued by it to defendant Moran Bros. Co., indemnifying the latter against loss from liability imposed upon it by law for damages, etc.

We quote from the opinion :

“Appellant, at the times here involved, was engaged in repairing and constructing ships and other water craft, and maintained a large plant for that purpose at Seattle. In connection with and as a part of its plant, it maintained a saw-mill, planing mill, lumber yard, machine shop, pattern shop, foundry, boiler shop, pipe shop, and a general light and power plant which furnished light and power for the whole plant. All of these were maintained in comparatively close proximity to each other, though they were separated either by walls or by being in different buildings. They were all mutually dependent upon each other, and were operated to one common end, that is, the building and repairing of ships and water craft. The policies here involved are numbered 3165, 3166 and 3167, respectively. All of them became

effective on May 4, 1905, and all of them expired on May 4, 1906. The amount of premium to be paid in consideration of the indemnity furnished by these policies was by their terms based upon the entire amount of the compensation paid by appellant to its employees, whose injuries or death appellant was indemnified against during the life of the policies. Hence, the amount of premium earned could not be finally determined until the expiration of the term. Because of this, the sums paid upon the premium at the time of the issuance of the policies were by their terms regarded only as tentative estimates of the amounts of the premium earned. It is to recover a balance claimed to be due upon premium so earned that this action was commenced and prosecuted."

Portions of the policies were set forth in the opinion which show that the premiums were based on payroll compensation at different rates to employees working in different departments, consisting of saw mill, planing mill and lumber yard, which carried one rate, drivers and drivers' helpers carrying a different rate, boiler makers, shipbuilders, blacksmith shop, etc., carrying a still different rate, machine and pattern shop carrying another rate, and so on. It was contended by the defendant in that case, that certain employees in certain departments were not covered by the policies, and that the remuneration paid them should not be taken into account in determining premiums earned, which exactly parallels the situation here. (Instead of having saw mills, shipyards, pattern shops, etc., in the instant case we have different numbered sections of highway.) The case contains an excellent exposition of the law on the subject which might have been profit-

ably cited and considered at the original hearing in this case. However, that is water over the dam and we no longer mourn over it.

On the question of interest, the following is persuasive, and we submit decisive of this case. The court said:

“In rendering judgment the trial court allowed interest at the legal rate from the 4th of May, 1906, that being the date of the expiration of the policies and therefore the date upon which the balance of the premium became due. It is contended that this was erroneous because respondent was suing upon an unliquidated demand, and that therefore interest was not allowable to the actual entry of the judgment. This is not a suit for damages based upon tort, nor do we think it is an accounting; but it is a suit to recover an amount due upon a specific contract for the payment of money and the amount due was determined by computation. It is true that the legal basis of the computation was a subject of controversy between the parties, but we think that is immaterial. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381; *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.* 63 Wash. 550, 115 Pac. 1087; *Fell v. Union Pac. R. Co.*, 32 Utah 101, 88 Pac. 1003, 28 L. R. A. (N.S.) 1, and note; 22 Cyc. 1513. That a suit to recover a claim of this nature is a suit to recover a specific sum due upon contract, and hence not an accounting, is held in *Pacific Coast Casualty Co. v. Home Tel. & Tel. Co.*, 11 Cal. App. 712, 106 Pac. 262. We are of the opinion that the trial court was not in error in allowing interest.” (Op. 179)

In *Dornberg vs. Black Carbon Coal Company*, 93



Wash. 682, 161 Pac. 645, in the course of its opinion, the court said:

“Whatever may be the rule in other states, it is now well settled in this state that interest is allowable upon an unliquidated claim when the amount thereof, can be ascertained by mere computation, and that the claim should be treated as liquidated from the time when its certainty is so determinable.” Citing a number of Washington cases.

This court in *United States vs. Skinner and Eddy Corporation*, 35 Fed. 2nd 889, had occasion to consider the question. In the course of its opinion (Op. 903), after recognizing that the law of the State of Washington applied to interest, held that interest would be computed from the date of accrual of the obligation to pay. Citing several Washington cases, among others, *Dickinson Fire & Pressed Brick Co. v. Crowe and Co.*, 63 Wash. 550, 115 Pac. 1087. In that case as was shown by the facts, the brick company sold a quantity of building brick at an agreed price. In due time in using the brick it was discovered that a quantity thereof was defective. The Crowe Company refused to pay. The brick company brought action and recovered for a portion of the brick delivered. The court held that as to the amount recovered it should bear interest from the date of the delivery of the brick.

In *McHugh vs. Tacoma*, 76 Wash. 127, 135 Pac. 1011, the Supreme Court had under consideration a case where a contractor agreed to place certain water pipe. The city under the terms of the contract changed

the route substantially, and a controversy arose as to whether or not the change of route was extra work. There was also involved the question of a new classifications for loose rock, whether the material was a hardpan, etc., the unit prices of which were fixed by the contract, the question of quantities only being involved. After determining the controversial questions as to quantities, the court allowed interest from the date of the completion of the contract.

It will be observed that the Supreme Court of the State of Washington, in *Empire St. Surety Company vs. Moran Brothers Co.*, cites the case of *Fell vs. Union Pacific Railroad*, 32 Utah 101, 88 Pacific 1003, an action for damages to a shipment of livestock, plaintiff recovered and the controversy arose as to whether or not the demand bore interest from the time of the damage to the livestock, or from the date of the final judgment. The following from the case is instructive:

“The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value. The same rule under the same conditions would of necessity apply to actions for breach of contract”.

The Supreme Court of the United States followed the rule laid down in the Fell case in *Mobile etc. Railway Co. vs. Jury*, 111 U. S. 584, 28 L. Ed. 527, and in *New York, Lake Erie and Western Railway Co. vs. Estel*, 147, U. S. 591.

In *Lloyd vs. American Can Co.*, 128 Wash. 298, 222 Pac. 876 the Supreme Court, in a well-considered case, cited the Fell case. In that case the court said:

“A good many cases hold that if there be a reasonably certain standard measurement by the correct application of which one could ascertain the amount he owed, interest should run on an unliquidated claim.”

In *Hill v. Brandes*, 1 Wash. 2d 196, 95 Pac. 2d 382, the court said:

“We held in *Dornberg vs. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 845, that interest is allowable upon an unliquidated claim when the amount thereof can be ascertained by mere computation, and that the claim should be treated as liquidated from the time that its certainty is so determinable.”

In *Barbo vs. Norris*, 138 Wash. 627 245 Pac. 414, the court had occasion to again consider the question of interest in an action to recover the value of labor performed by a subcontractor in connection with work on a railroad right-of-way. The contract was on a unit price basis. The time of payment was fixed. The controversy was as to quantities and credits given. When these questions were determined the amounts due could be determined by computation, and the court

allowed interest from the time the several accounts accrued.

In *Yarne vs. Hedlund Box & Lumber Co.*, 135 Wash. 406, 237, Pac. 1002, the Supreme Court of the State of Washington again had occasion to consider a situation quite similar to the one here. As shown by the facts a judgment of the lower court was modified on appeal. The matter then went back to the lower court to enter a judgment for a reduced amount in accordance with the opinion. It appears that the question of interest was not raised on the first appeal, and the court held that the second judgment would relate to the time when the findings were originally filed and allowed interest in accordance with the findings.

The following from the case of *Sullivan vs. McMillan*, 19 So. 340, is highly persuasive and, we think, states a most wholesome rule:

“Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt or as a compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident.”

In view of the parallel case of *Empire State Surety Company vs. Moran & Co.*, supra, which cannot be distinguished, it appears that nothing further need be said on this subject.

## RES ADJUDICATA

Appellant's Specification of Error No. 4, as follows:

“Appellant (Plaintiff) is entitled to interest at the legal rate from September 1, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (Tr. P. 31), which is *res adjudicata* on the question of interest. (That part of the judgment not being reversed by this Court).” (Tr. p. 578)

raises the question of the effect of a prior judgment of the lower court affirmed by this court.

The judgment of the lower court from which the first appeal was taken, among other things, provides:

“ORDERED, ADJUDGED and DECREED that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover of and from C. F. Lytle Company, Inc., a corporation, of the State of Iowa, and Green Construction Company, a corporation, of the State of Iowa, and each of them, the principal sum of \$16,153.73, together with interest thereon at the rate of six per cent per annum from September 1, 1942; together with costs in the sum of \$94.00.

“Dated September 22, 1944.” (Tr. p. 31)

It was found and determined by the trial court, which fact is not disputed, that the insurance policy in question was cancelled by defendants effective September 1, 1942. (Tr. p. 29)

By its judgment the trial court determined and adjudged that as of September 1, 1942 a certain amount became due and owing appellant from appellees and awarded a recovery therefor, with interest from September 1, 1942 (Tr. 30), which judgment on appeal was not *reversed* by this court, but the cause was *remanded* with directions to eliminate a part only

of the original recovery. The balance of the recovery, with interest, was not affected. Neither the trial court nor this court has the power at this time to disturb that part of the judgment. *Thompson vs. Maxwell Land Grant Company*, 168 U. S. 451-456; 42 Law Ed. 539. See particularly, quotation with approval by this court (Morrow J.) from Judge Field's Opinion in *Matthews vs. Columbia National Bank*, 100 Fed. 397 (Ninth Cir.). It has become the law of the case and it necessarily follows therefrom that the adjudication that appellant is entitled to premium on the payrolls (\$90,053.81) of Weldon Bros. and Dusenbergl Co. Inc., the amount of which was arrived at by computation, together with interest thereon from the agreed due date, September 1, 1942, is conclusive. There is nothing different or distinct with respect to other payrolls on the same job made a base for premium computation by the Trial Court in its findings and judgment on further hearing, which by the same token is governed by the law of the case, fixed, established and determined with respect to the payrolls of Weldon Bros. & Dusenbergl Co., Inc. In this respect the question is not affected only by the rule of *stare decisis* permitting a court under certain circumstances to overrule a former decision on the law, but the action here is between the same parties, and the former decision makes the law of the case and is in this respect *res adjudicata*. *Supervisors v. Kennicott*, 94 U. S. 498; 24 L. Ed. 260; *Matthews v. Columbia National Bank*, 100 Fed. 393.

In *Thompson v. Maxwell Land Grant Co.*, supra, Mr. Justice Brewer speaking for the court said:

“It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.”

We respectfully contend that this portion of the judgment of the lower court, which was not made an issue on the first appeal and which was affirmed by this court by decision in sustaining the right to the recovery of a premium on part of the claim, with interest from September 1, 1942, is the law of the case. While the question of interest was not discussed, it appears clear that this court had the interest item in mind since it was referred to in the first paragraph of its opinion. *State vs. Superior Court of Spokane County*, 74 Wash. 556, 134 Pac. 173; *City of Camas v. Higgins*, 120 Wash. 40, 206 Pac. 951; *Moore v. Sacajawea Lumber & Shingle Co.*, 144 Wash. 38, 256 Pac. 331, in which case the court said:

“That determination became conclusive of those matters and thereafter the court was without right to attempt to readjudicate in the same case things not at all different or distinct, but the same as those theretofore adjudged and determined.”

In the case of *Gange Lumber Co. vs. Rowley*, 22 Wash. 2d 250, 155 Pac. 2d 802, decided by the Supreme Court of this state (an *en banc* decision January 22, 1945, the Court said:

“As hereinbefore set out and shown by the record, both of the above questions of law were before this court in ‘Lane v. Department of Labor Industries, supra,’ and specifically decided therein contrary to the contention of the Gange Lumber Company as there made, and contrary to its contentions on this appeal. As this appeal involves the same parties, the same subject matter, and the same questions of law as were involved in the Lane case, supra, the decision in that case on the legal questions here raised, became the law of this case, and therefore when this cause came before the Superior Court it was bound by the law of the case as decided on the former appeal, and as no issue of fact was involved, but only the same issues of law as on the former appeal, the trial court had no alternative other than to dismiss this action. (Camas v. Higgins, 120 Wash. 40, 206 Pac. 951; Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157, 58 A.L.R. 1482; Epley v. Hunter, 157 Wash. 333, 289 Pac. 27.)

In the case last cited, we quoted from 2 R. C. L. p. 223, as follows:

“A Court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the ‘law of the case’ upon a subsequent appeal; the only mode for reviewing the decision on the prior appeal being by a motion for a rehearing.”



No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal.

For the reasons herein assigned, the judgment of the trial court is affirmed.

BEALS, C. J., STEINERT, BLAKE, ROBINSON, MALLERY, and GRADY, J. J., concur.

MILLARD, J. (concurring)—I concur solely on the ground that our opinion or decision in 'Lane v. Department of Labor & Industries, supra,' is the law of the case at bar. I am still of the view that this court grossly erred in its opinion in the Lane case. The constitutional question appellant seeks to raise may be presented in another case in which a different party than in Lane case brings the question here.

SIMPSON, J., concurs with MILLARD, J."

This appears to be the last expression of opinion on the subject by our Supreme Court, and under the law governing practice in the Federal Courts, the decisions of the state court are binding on the Federal Court. It will be noted that three of the judges were of the opinion that the first decision was unsound, but inasmuch as it became the law of the case they concurred with the majority of the Court.

For the foregoing reasons we respectfully submit that the judgment of the lower court should be re-

versed and the lower court should be directed to enter judgment in behalf of appellant and against defendants in the amount of \$10,193.20, together with interest at the legal rate from September 1, 1942.

Respectfully submitted,

CHARLES T. PETERSON  
PETERSON & DUNCAN  
JAMES L. CONLEY

*Attorneys for Appellant.*

No. 11639

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IN THE  
**United States**  
**Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

HANSEN & ROWLAND, INC., a corporation  
*Appellant*

vs.

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a corporation,  
*Appellees.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE WESTERN DISTRICT OF WASHINGTON  
SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

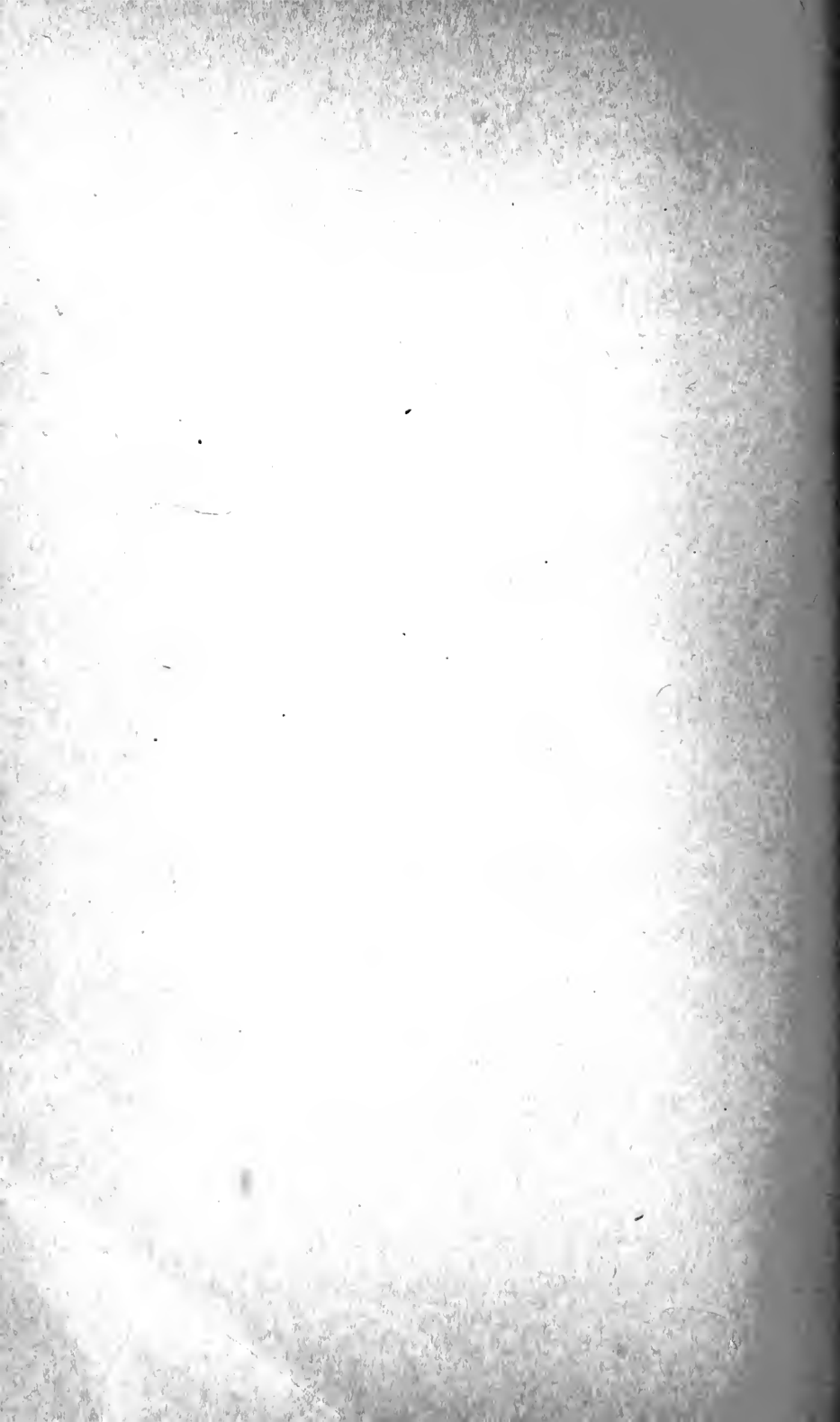
**BRIEF OF APPELLEES**

---

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324 FEDERAL BUILDING  
TACOMA 2, WASHINGTON



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**BRIEF OF APPELLEES**

---

**JURISDICTION**

We concede the jurisdiction of the Court on this  
appeal for the reasons set forth in appellant's brief.

**STATEMENT OF THE CASE**

*Pleadings.*

The appellant's resume of the pleadings is sub-  
stantially accurate, except that its complaint actually

was predicated upon the theory of an account stated. (Tr. 6).

*Facts.*

This is a second appeal.

In order to refresh the Court's recollection of the facts as they were submitted in the first appeal, (Opinion, 151 F. (2d) 573) we repeat here "the Summary" of the evidence as set forth in our brief on the first appeal.

"The defendants (present appellees) entered into a cost-plus-a-fixed-fee contract with the United States government to perform certain operations on a portion of the Alaska highway designated as 'from a point on the international boundary line between Canada and Alaska, to a point near Slana, Alaska, approximately 155 miles, designated 'Sections A-1 and A-2.' A number of other contractors, herein designated as associate contractors, had individual contracts with the government for certain specified operations on the same portion of the highway. The defendant's contract was known as an Engineering Management contract.

"The defendants applied to the plaintiff (present appellant) for a comprehensive liability insurance policy to cover their operations on this portion of the highway. The plaintiff was an agent for the Phoenix Indemnity Co., of New York, which company issued the policy through plaintiff. The policy was issued July 17, 1942, and it took effect as of June 17, 1942. It was cancelled as of August 31, 1942. The policy insured the defendants and all the associate con-

tractors and provided for a premium at the rate of 85 cents per \$100.00 remuneration paid to employees of all the contractors. On the basis of the payroll claimed by the plaintiff for the period of coverage the premium at the 85 cent rate amounted to \$8,969.31. (Tr. 161). Because of a so-called 'short rate' premium the premium claimed and allowed by the court's judgment, came to \$16,153.73. There was no loss under the policy during the period of coverage. (Tr. 42). When the policy was cancelled it was replaced in another company at an ultimate rate of 4 cents per \$100.00 of payroll. (Tr. 200).

"The defendants contended that the million odd dollars of alleged payroll upon which the premium was claimed was not the payroll of employees of the contractors, but was the payroll of government employees. They further contended that if the workmen be considered employees of the contractors, that the payroll upon which the premium was claimed was far in excess of the payroll attributable to premium since only two of the contractors actually worked upon the section of the Alaska Highway designated in the policy during the period of coverage, and that the only payroll upon which premium should have been determined was the payroll of these two contractors, amounting to \$90,053.81."

This Court, on the first appeal, held against our contention that the employees were government employees rather than contractors' employees. On our second contention in the first appeal, namely, that the trial Court erred in its failure to restrict the premium base to the work actually done within the 155

miles of highway, we were in effect sustained and the judgment of the trial Court was reversed and the cause remanded, with directions to take evidence on the issue as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment should come within the premium base.

Pursuant to that mandate further proceedings were had before the trial Court commencing on November 2, 1946. As a result of those proceedings the Court entered additional Findings of Fact and Conclusions of Law, and a Judgment allowing recovery in favor of the present appellant in the sum of \$4,904.10, together with costs. (Tr. 468-475).

At the rehearing the trial Court stated its interpretation of this Court's mandate as follows:

*The Court:* What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I (70) am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections — that's 1 and 2, during the period here involved, and in addition thereto, there should be included, in so far as it can be ascertained, the time these employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3,

so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract. (Tr. 545).

Following that formula the trial Court made Findings to the effect that the total remuneration attributable to the premium base was made up of the following items:

Travel time and unloading and moving equipment (F. of F. 1, Tr. 469) .....	\$202,882.86
Payroll actually expended within 155 miles (F. of F. 2, Tr. 469) .....	90,053.81
Maintaining Section A-3 in order to convey supplies and equipment to 155 mile section (F. of F. 3, Tr. 470) .....	27,594.00
Total .....	<u>\$320,530.49</u>

The premium figured on the short rate basis on this total remuneration amounted to \$4,904.10, for which judgment was entered.

The item of \$202,882.68 for travel time and unloading and moving equipment is made up of the following figures:

Travel Pay of Welding Brothers' Employees (Tr. 564, Defendants' Exhibit A-16) .....	\$ 9,781.24
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Travel Pay of Dusenbergs Brothers' Employees (Tr. 564, Defendants' Exhibit A-16) .....	15,168.64
Travel Pay of Employees of all Other Contractors (Tr. 539, Defendants' Exhibit A-15) .....	137,932.80
Unloading and transportation of Equipment of all Contractors (Tr. 556-7) .....	40,000.00
Total .....	<u>\$202,882.68</u>

The items for travel pay were stipulated by appellant's counsel. The item of unloading and transporting of equipment was estimated by the Government engineer on the project.

The item of \$90,053.81 was the payroll of the employees of Dusenbergs and Weldon Bros., for work done actually within the 155 mile section of the highway. This portion of the payroll was recognized as being attributable to premium base by this Court on the prior appeal. (Opinion P. 576).

The item of \$27,594.00 for maintenance work on Section A-3 was an estimate of the Government engineer. (Tr. 557, 563).

At the rehearing before the trial Court the Government engineer in charge of the work under this contract in Alaska, testified that after looking over

the proposed site of the highway to be constructed under the contract and observing that they would be unable to get into Sections A-1 and A-2 because of the Army's deployment of men, that he requested authority from his chief in Washington to divert the contractors to other sections of the highway, principally Section A-3 and A-4; that he received such authority by telegram some time between June 15, 1942, and July 1, 1942 (Tr. 501-504); that as the employees of these several contractors began to arrive in Alaska and as soon as their equipment was unloaded at Valdez and transported in to the site of the work, they were diverted to these other sections of the highway (Tr. 508). He testified that because of the muddy conditions some repair and maintenance work was done on Section A-3, although this was an existing road. (Tr. 524-7, 512, 520, 522). A few of the men from all of the contractors' organizations were used in this maintenance work and the exact payroll for such maintenance work could not be accurately determined at the time of the hearing. (Tr. 540). The engineer estimated the payroll of all contractors for such maintenance work at \$27,594.00. (Tr. 557). Most of the equipment of the various contractors was shipped to Valdez by boat and there unloaded by their employees to transport in to Gulkana. At the time of the second hearing there was

no means of determining the exact payroll of the men engaged in unloading and transporting this equipment. The engineer, however, estimated that \$40,000.00 was a reasonable estimate of payroll for that work.

The travel time of the employees for the period while they were enroute to Alaska and until their diversion to other sections of the highway is established by defendants' exhibit A-16 for the employees of Dusenbergl and Weldon Brothers, and by defendants' exhibit A-15 for the employees of all other contractors. The amount of payroll reflected by these exhibits is conceded to be accurate by appellant in its present brief. (Appellant's Brief p. 15).

## ISSUES ON THIS APPEAL

While the appellant sets forth four separate assignments of error, there are really two issues involved in the present appeal. They are:

- (1). *Should the premium be based upon 50 percent of the total payroll of \$1,055,214.02?*
- (2). *Should interest be allowed on the judgment from date of termination of the insurance policy?*

## ARGUMENT

In urging the affirmative of the first issue ap-



pellant relies, apparently upon two points, the first being set forth in its Assignment of Error No. 1. The effect of this contention, as we understand it, is that the trial Court committed error in requiring the appellant to bear the burden of proving the amount of payroll upon which this premium was predicated.

We do not believe it is possible for parties by contract to shift the burden of proof in a law suit. In the present case if we assume that the defendants failed to supply proper records to the plaintiff and thereby breached the contract, and that as a result of such breach the premium was then to be predicated upon 50 percent of the entire contract cost paid the contractors, the burden of proof would still be upon the plaintiff to establish what that contract cost amounted to. So, the problem is not one of burden of proof but rather one of interpretation of the contract.

We think it should be noted that the appellant's present theory as to how the premium should be determined is a radical shift from its position in the first trial and appeal. This present theory is nowhere suggested in the pleadings and it was never heretofore seriously urged until on this present appeal.

Appellant's present argument in this connection is bottomed upon a paragraph of the printed policy,

which is not applicable because eliminated by an attached endorsement. (Counsel apparently inadvertently overlooked this fact). On page 13 of its brief appellant quotes, and on page 16 repeats as a part of the insurance contract the following:

“The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.” (Tr. 1 pp. 73-74).

A reference to the second page of the photostatic copy of the insurance policy, appearing in the transcript between pages 71 and 77, will show that this quoted paragraph begins with the very last line of that page. It will also be observed that this paragraph is a portion of paragraph 1, “Premium” under the general sub-head CONDITIONS. This portion of the printed policy is eliminated by endorsement No. 3, paragraph 3, in this language:

“3. Condition 1, Premium, in the under-mentioned Policy is eliminated and the following substituted therefor:” (Tr. 84).

Actually the only provisions of the insurance policy which have to do with the maintenance of records for computing premium, are those contained in the endorsement entitled “Premium Adjustment En-

dorsement" (Tr. 77), in the following language:

"It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy."

and the portion of endorsement No. 3 reading as follows:

"\* \* \* The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall assume responsibility for the maintenance of such records as are necessary for the computation of earned premium on said Policy, and for the payment of such earned premium to the Company. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor." (Tr. 83).

With respect to the requirement upon the defendants under the first quoted endorsement, the defendants complied by furnishing to the plaintiff the periodic payrolls. (Plaintiff's Exhibit 6, Tr. 89-94; Plaintiff's Exhibit 7, Tr. 94-100; Plaintiff's Exhibit

8, Tr. 100-103; and Plaintiff's Exhibit 9, Tr. 103-106). Under the provisions quoted from endorsement No. 3, it provides that the 50% alternative method of computing premium shall be applied only "if, in case of any other contractor or sub-contractor covered as an additional named insured under said Policy, remuneration of such contractor's or sub-contractor's employees is not available to the company. \* \* \*"

Before the insurer would be entitled under this language to compute premium by this alternative method the burden would be upon it to establish that the records for computation of premium *were not available* to the insurer. We submit that there is no evidence that this was a fact. Instead, the evidence shows that at the time of the progress of the work under the contract that the records were not only *available*, but that the entire payrolls were in fact transmitted to the plaintiff. That the government engineer as a witness at the rehearing some four or five years later, and having no access to records, was not then able to accurately give the figures of payrolls attributable to certain phases of the work, falls far short of establishing that the remuneration was "not available" within the meaning of the endorsement.

So it would seem that under any fair interpretation of the provisions of the policy and its endorse-

ments, the appellant should not now be entitled to resort to the alternative method of computing premium and thereby to use as the base for premium purposes the entire payroll of \$1,055,204.02, which this Court has heretofore ruled is not the premium base.

An additional answer to the appellant's contention on this issue is that the "50% of total contract cost" method of computing premium is likewise limited to the operations within or "in connection with" the 155 mile section of highway. Both the provision providing the alternative method of computing premium and the provision limiting the policy to the 155 mile sections are incorporated in the policy by means of endorsements attached thereto. These provisions are not incompatible with each other and hence the "spatial narrowings of coverage" as used in the area limitation endorsement apply to and restrict and limit the application of the alternative premium computation endorsement. As this Court stated on the first appeal (Opinion, p. 577) "the policy does limit coverage to a specific area." Likewise that Opinion and the principles therein stated limit the premium base to remuneration emanating from such specific area.

On this issue the Court might well apply the principle suggested by it in *City of Seattle vs. Puget*

*Sound Power and Light Company*, 15 F. (2d) 794, in the following language at 795:

“\* \* \* A decree was thereupon entered in favor of the plaintiff, in accordance with the prayer of the complaint, and in accordance with the mandate of this court. From that decree the defendant has appealed.

“There is no serious contention that the court below failed or refused to carry out the mandate of this court on the second trial, and, if the decision of this court on the former appeal is to be accepted as controlling on the present appeal, it only remains to consider certain affirmative defenses interposed and the form of the decree itself.

“The rule is firmly established that the decision of an appellate court on appeal or writ of error is controlling upon the court below after the case has been remanded, and is equally controlling upon the appellate court on a second appeal or writ of error in the same case. No doubt isolated cases may be found where appellate courts have disregarded the rule, and their power to do so is not questioned; but the overwhelming weight of authority is in its favor, unless between the two decisions there has been some change in the law, by legislative enactment or judicial decision, which the appellate court is bound to follow. The rule itself has been iterated and reiterated by the Supreme Court and by this court.” (citing cases)

*“Should Interest Be Allowed From Date Of Termination Of The Insurance Policy?”*

On this issue appellant likewise urges two specifications of error.

One of the specifications is to the effect that the prior decision of this Court is *res adjudicata*. This contention we believe hardly merits attention. The prior decision hardly mentions the matter of interest. On the prior appeal the question of right to interest was at no time argued, considered or even suggested. The principles of *res adjudicata*, or law of the case, are never applied to issues which "merely lurk in the record." *New York Life Insurance Co. vs. Gamer*, 106 F. (2d) 375, at p. 376 (C.C.A. 9).

It is inconceivable that those principles should be here applied to foreclose a controversy over the right to interest on the sole basis of this Court's single and casual use of the word "interest" in defining the judgment appealed from. It is doubtful if the court's limited reference to interest would even raise this issue to the status of one lurking in the record.

Appellant's other assignment of error in respect of the right to interest raises the question of the right to interest before judgment on liquidated and unliquidated claims and the further question as to whether its claim for premium was in fact liquidated or unliquidated prior to judgment.

We agree with the appellant that the law of Washington must be looked to in deciding this question..

The law as applied in the State of Washington is that interest is allowable from the time the claim was due upon a liquidated account, but is not allowable on an unliquidated account, except from date of judgment. An exception to this rule is that interest may be allowed from the date due on an unliquidated account if the amount of the claim can be determined by mere computation. The Washington court further holds that a claim is unliquidated to a degree that it cannot be determined by mere computation whenever it requires evidence to establish the quantity or amount of the claim.

In *Wright vs. Tacoma*, 87 Wash. 334, 151 Pac. 837, the rule is stated as to both liquidated and unliquidated accounts. The case was a suit by the plaintiff on a contract with the City of Tacoma for the installation of a water system. Regarding the right to interest the Court says, beginning at page 352:

“One other question is presented which requires consideration. The trial court included in the judgment interest from the first day of June, 1913, that being the day upon which the pipe line was accepted by the city. Of the amount claimed by the respondent at that time, \$71,444.84 was not in dispute, this apparently being the amount withheld by the city until the acceptance of the work. But, as already stated, this was not paid until September 12, 1913, when \$60,000 was paid, and October 5, 1913, when the balance of



\$11,444.84 was paid. The trial court allowed interest on these two amounts from the date of the acceptance of the work until the respective payments were made. On the other items, amounting to \$98,042.48, the trial court likewise allowed interest from the time of the acceptance of the work until that sum should be paid.

“The general rule is that interest will not be allowed upon unliquidated demands prior to the time when such demands are merged in the judgment. This rule, however, like many general rules, has its exceptions. *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458. One of the exceptions is that interest will be allowed upon an unliquidated demand when the amount thereof can be ascertained by mere computation. In *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381, it was said:

‘The courts are not in harmony on the question, but the general rule is that interest will be allowed on an unliquidated demand, the amount of which can be ascertained by mere computation, from the time the demand accrues.’

\* \* \*

“Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished, or the value of the services rendered, interest will not be allowed prior to judgment. \* \* \*.”

\* \* \*

“Applying these rules to the present case, we are of the opinion that, as the \$71,444.84, the trial court properly allowed interest. Upon this item there appears to have been no dispute. Evidence was not required to establish the amount thereof. As to the other items which were in-

cluded in the total of \$98,042.48, interest could not be allowed prior to the entry of the judgment. With possibly one exception, the items which made up this amount were in dispute, *either as to the amount of work done, or the material furnished, or the price which was to be paid therefor. It being necessary to establish by evidence the amount of the services furnished, or the quantity of the material supplied, and not being able to establish these either by computation or by reference to a known standard, interest prior to the date of the judgment was improperly allowed.*" (Italics ours).

*Brewster v. State*, 170 Wash. 422, 16 P. (2d) 813 is another action upon a Public Works contract. As to the plaintiff's right to interest upon disputed items the court says, at page 424:

"Interest should not have been allowed upon the recovery of \$18,512.78 prior to the date of the judgment. The demands on both sides, that of the contractor for \$29,700.33 and that of the state for \$2,231.83, were unliquidated. As to some of the items, evidence was required to establish the value of the services rendered. As to the other items, the classification thereof and the price to be paid therefor were disputed. *It was essential that evidence be adduced to establish the quantity of work performed, as well as its classification, to ascertain the amount due. In Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837, we held that 'Where, however, the demand is for something *which requires evidence to establish the quantity or amount of the thing furnished, or the value of the services rendered, interest will not be allowed prior to the judgment.*'" (Italics ours).

In our present case it was necessary to take evidence to determine how much payroll was actually expended for work done within the 155 mile limits; it was necessary to take evidence to determine how much payroll represented wages paid the employees for the time they were en route to Alaska; it was necessary to take evidence as to what portion of total payroll was expended in unloading equipment at Valdez and transporting it to Gulkana, and additionally, it was necessary to take evidence as to what portion of payroll was expended in maintaining Section A-3. All of this evidence was required in order to determine the claim of the appellant in accordance with the formula indicated by this Court's prior opinion. The claim could not be determined by "mere computation" until evidence was adduced respecting the length of periods of employment, the number of men engaged, the amount of time required, etc., on the several phases of the work which were held to be operations in connection with the 155 miles of highway.

An additional reason for refusing interest on unliquidated accounts as stated by the Washington Supreme Court, is that in such circumstances interest is in the nature of a penalty and should only be allowed for a default; that since there can be no default in connection with an unliquidated demand — because

the obligor does not know the amount of the obligation — interest is disallowed.

In *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139 the action was one for wages under the State Minimum Wage For Women Act. By that Act and regulations issued under it, certain fixed weekly wages were required as minimum wages. The plaintiff had been employed by the defendant for a lesser sum than the minimum wage. However, in that action there was a dispute as to the period of employment and as to the off-sets for board and room furnished the plaintiff. Under the Minimum Wage Act, allowances for board and room were also fixed in definite amounts. The plaintiff sued for \$1705 and the trial court allowed \$207.90, giving effect to some of the claimed off-sets. With respect to the question of interest which was disallowed by the trial court, the Supreme Court says, at page 610:

“It is assigned as error that the court refused to allow interest except from the date of judgment, and contended that interest on the amount of each monthly recovery, as it became due, should have been allowed, or, at least, interest from the date of judgment. It is a general principle that interest is not allowed upon unliquidated demands prior to the time when such demands are merged in the judgment unless the amount thereof could have been ascertained by mere computation. *Wright vs. Tacoma*, 87 Wash. 334, 151

Pac. 837. Where no interest is stipulated for, its allowance is by way of damages on account of default. The reason why it is not allowed on unliquidated demands is said, by Sutherland in Sec. 347 in the 4th edition of his work on Damages, to be as follows:

“Interest is denied when the demand is unliquidated, for the reason that the person does not know what sum he owes and therefore cannot be in default for not paying’.

“In this case, as the court found, neither of the parties supposed that anything was due or owing during the course of the employment. The appellants’ demand, when made, was for \$1,705. The respondent was not in default in not complying with the demand. She did not know — no one knew — what sum she owed or that she owed anything until the court found the facts, construed the order, and pronounced judgment in the case.”

See also *Great Northern Railway Company v. Washington Electric Company*, 197 Wash. 627 at p. 650, 86 P. (2d) 208, where the Court says:

“In *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139, a case decided since the trial court rendered its decision in the instant case, it is pointed out that, where no interest is stipulated for, its allowance is not, strictly speaking, an allowance as interest, but as damages on account of default, and that the reason no allowance is made on unliquidated demands is because the person against whom the demand is made does not know what sum he owes and, therefore, cannot be in default for not paying.”

In accordance with this principal appellees should not be penalized by the exaction of interest for failing to pay the demand originally made upon them by appellant. It must be obvious that at the time demand was made by appellant for the full premium that neither party actually knew what was due.

The Washington court has gone so far as to hold that even where one pays the obligation of another that in a suit for reimbursement he is not entitled to interest from the date of payment.

In *Nelson v. Seattle*, 180 Wash. 1, 38 P. (2d) 1034, the action involves claims growing out of the Denny Regrade contract between the plaintiff Nelson and the City of Seattle. It involves several sub-contractors. One of the sub-contractors, Vigilant Towing Co., was to convey the earth being removed, from the dock to a point out in the bay where it was dumped. In carrying out this sub-contract the Vigilant Towing Company caused shoals to be deposited by dumping too much of the dirt in one place thereby endangering navigation, which was in violation of a War Department permit. The principal contractor, Nelson, the plaintiff, was required to dredge the shoals at a cost to him of \$10,125.00.

This amount he actually paid for the dredging and the lower court allowed him interest from the

date of payment. The Supreme Court, however, disallowed the interest, saying, at page 28:

“Vigilant assigns error to the allowance by the trial court of interest on \$10,125 from November 18, 1931. That is the date Nelson paid for the dredging of the shoals. The theory of the allowance of interest was that payment for the dredging made the claim a liquidated one against Vigilant, since the payment made was the reasonable cost of the dredging. We do not so view it. The question of liability and the reasonable cost of dredging was still open to contest after the payment was made by Nelson. The claim was unliquidated, and, therefore, interest was not allowable on it until it was reduced to judgment. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

Probably the most recent pronouncement of the Washington court on this question is that contained in *State of Washington v. Northwest Magnesite Co.*, 127 Wash. Dec. (No. 22) 900.

This was an action by the State for royalties alleged to be due under a lease of public lands to the defendants for mining or quarry purposes. The lease provided for the payment of a royalty at the rate of 4% on the basis of moneys received by the lessee from the sale of magnesite products by it, after deducting therefrom the cost of transportation and treatment. Judgment was entered in favor of the State for

unpaid royalties but interest was disallowed. The Court held, at page 934:

“Appellant complains that the court erred in refusing it interest on sums found owing by respondents. It takes the position that the additional royalties due from Northwest are a liquidated debt. With this contention we do not agree.

“There was an honest dispute between the parties to the contract as to the meaning of the terms ‘moneys received’ and ‘transportation and treatment’, so that even an approximate measure of liability could not be ascertained by the lessee until that dispute was adjudicated. Neither the judgment of the trial court nor the measure of delinquent royalties arrived at by this court represents a debt which might have been determined without resort to compromise or else to a lawsuit. In these circumstances, the state has no claim upon the respondents for interest accruing prior to judgment. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837; *Fowler vs. Gray*, 141 Wash. 372, 251 Pac. 570; *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139; *Fiorito v. Goerig*, 127 Wash. Dec. 574, — P. (2d) — Sec. 40 C. J. 1027, 1028, Mines & Minerals, Sec. 633.”

The case of *Empire State Surety Company v. Moran Brothers Company*, 71 Wash. 171, 127 Pac. 104, which is so heavily relied upon by appellant, is readily distinguished. It will be noted by an examination of that case that the primary issue as to the amount of premium depended solely upon an interpretation of certain words in the contract. The Court



states the question as follows at p. 176:

“ \* \* \* do the words of the schedules under the heads ‘Kind of trade or business,’ and ‘Kind of work’ refer generally to the nature of the work carried on at the places designated, so as to include all who are engaged in the prosecution of the work; or are those words used only as names of specific trades, so as to confine their meaning to specific classes of artisans or workmen there employed. \* \* \* ”

In discussing the right to interest the court says that the amount of premium was determinable by computation and that the fact that the legal basis of the computation was a subject of controversy between the parties was immaterial. But it must be obvious that the “legal basis of the computation” involved only the interpretations of the words “kind of trade or business” and “kind of work” and that when that interpretation was legally determined that then the amount of premium was merely a matter of computation. No further evidence was required to determine the premium. In our case, however, after the scope of the policy was determined by this court, it was still necessary to take evidence as to numbers of men, periods involved, necessity of work as being in connection with the 155 miles, etc., in order to determine the amount of premium. As indicated in the present rule of the Washington court a claim is not determinable by mere computation if evidence is

required to establish its amount.

We consider it advisable to make the following brief comments concerning some of the other cases relied upon by the appellant.

We have no quarrel with the principle stated in the excerpt quoted by appellant (Apt's Brief p. 31), from *Dornberg v. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 645. Here the certainty of appellant's claim was never determinable prior to the rehearing by the trial court.

The case of *Dickinson Fire & Pressed Brick Company v. Crowe & Company*, 63 Wash. 550, 115 Pac. 1087 (Apt's Brief p. 31), merely holds that a liquidated claim is not rendered unliquidated because of the fact an unliquidated counter claim is asserted against it.

The case of *Lloyd v. American Can Company*, 128 Wash. 298, 222 Pac. 876 (Apt's Brief p. 33) reiterates the rule established by the Washington court to the effect that where evidence is required to establish the amount of the claim interest will not be allowed prior to judgment. It quotes from *Wright v. Tacoma*, *supra* in support of the rule.

The case of *Hill v. Brandes*, 1 Wash. (2d) 196, 95 P. (2d) 382 (Apt's Brief p. 33) was a suit by the

receiver of an insolvent corporation to recover moneys paid by the corporation after the corporation became insolvent. Obviously the amount of these payments were liquidated and were entitled to draw interest from the date of payment by the insolvent corporation and that was what the court allowed.

*Barbo v. Norris*, 138 Wash. 627, 245 Pac. 414, (Apt's brief p. 33) was an action by a sub-contractor against the principal contractor and a railroad company for which certain grading work was done. The suit was for payment due under the sub-contract and the railroad was joined to assert the sub-contractor's lien against its property. The controversy was not over quantities or credits given, as appellant states, but rather was over the question whether the sub-contractor had completed his work and whether delay penalties were caused by the principal contractor or the sub-contractor and whether the liens could be asserted against the railroad. The court found that the plaintiff sub-contractor had completed his contract and was not responsible for delay and hence the amount due him was determinable by mere computation and was entitled to interest from date of completion of contract. There was no dispute as to quantities of work or price allowable therefor.

Appellant states the case of *Yarno v. Hedlund*



In the  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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No. 11639

---

C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a Corporation, *Appellee,*

vs.

HANSEN & ROWLAND, INC., a corporation,  
*Appellant.*

---

UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**PETITION FOR REHEARING**

---

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FILED  
APR 7 - 1948  
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*Box & Lumber Company*, 135, Wash. 406, 237 Pac. 1002) (Apt's brief p. 34) is quite similar to the one at bar. The only similarity is that it was a second appeal. The situation in that case is well expressed in the first few lines in the Opinion, as follows:

"Plaintiff brought an action to recover upon a logging contract. A jury trial resulted in a verdict for \$22,310. Upon appeal we held that, inasmuch as the sums of money due under the contract were not payable excepting at certain specified times, a judgment for the whole amount at the time of trial would be more valuable than the right to receive the money at a later period, and that therefore the amount of the judgment should be reduced. \* \* \*."

Upon remand the trial court found that the worth of the recovery at the time of the verdict was \$19,065.69 and entered judgment for that amount together with interest from the date of the original judgment. On the second appeal the Supreme Court held that the original judgment liquidated the amount of the claim and hence interest should attach from that time. That situation is quite different than ours, where the original judgment did not liquidate the claim, and in fact evidence was thereafter required to determine the amount of it.

It is submitted that the present judgment is in strict conformity with this court's directions on the former appeal in respect of the amount of the pre-

mium due and that it likewise is in conformity with the law of Washington in respect of the right to interest and that it should be affirmed.

Respectfully submitted,

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In the  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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No. 11639

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C. F. LYTLE COMPANY, INC., a corporation,  
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a Corporation, *Appellee,*  
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HANSEN & ROWLAND, INC., a corporation,  
*Appellant.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
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HONORABLE CHARLES H. LEAVY, *Judge*

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In the  
United States  
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FOR THE NINTH CIRCUIT

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No. 11639

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C. F. LYTLE COMPANY, INC., a corporation,  
and GREEN CONSTRUCTION COMPANY,  
a Corporation, *Appellee,*

vs.

HANSEN & ROWLAND, INC., a corporation,  
*Appellant.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

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HONORABLE CHARLES H. LEAVY, *Judge*

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*Appellant.*

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UPON APPEAL FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

---

HONORABLE CHARLES H. LEAVY, *Judge*

---

**PETITION FOR REHEARING**

---

Appellant petitions the Court for a rehearing  
herein on the following grounds:

- (1) The Court erred on the facts regarding  
the premium base;
- (2) The Court erred in failing to apply long  
established, correct rules of law in deter-  
mining the right of Appellant to recover  
interest under the doctrine of *res judicata*.

The foregoing will be discussed in the order presented.

In the course of its opinion this court said:

“Assuming that appellees had not fulfilled their contractual duty of furnishing proper payroll records to appellant and that the alternative 50% of entire contract cost provision was applicable, the burden of proof would nevertheless remain with appellant to establish the amount of contract cost.”

There is no dispute as to total contract cost; it was \$1,055,214.02. There was but one contract and one bond.

The travel time of \$15,168.64 and \$137,932.80 applied to the work involved on the \$1,055,214.02 total.

This Court proceeds:

“But the express condition in the policy upon which the alternative 50% of entire contract cost provision became operative, was that the remuneration of the contractors’ employees be ‘not available to the Company’—a condition which was not established by appellant at the hearing.”

It is true payrolls covering the entire amount were supplied to appellant, and are in evidence. Appellees were able to break them down to the extent of showing the travel time. Beyond that they could not go.

In the interest of fairness and accuracy please



read Mr. Polk's uncontradicted testimony found at pages 540-541 of the Transcript; it follows:

## DIRECT EXAMINATION

By Mr. Sager:

Q. Now, Mr. Polk, you testified this morning that there were some work on the part of all of these various contractors in unloading and transporting their equipment from Valdez into the job.

A. Yes.

Q. *Would there be any means of determining the actual and accurate payroll of those men upon that type of work?*

A. *No, there is no way that you can determine it mathematically correct.*

Q. Have you given consideration to the matter and arrived at an estimated figure of what that payroll would be?

A. Yes. (64)

Q. What was that figure? A. \$35,000.

Q. And that would be for all the men of all the contractors, exclusive of Weldon Brothers and Dusenberg? A. Yes.

Q. And that figure would cover both the unloading and the transportation? A. Yes.

Q. —to the job. Now likewise you testified this morning that some of the men were used upon Section A-3 in maintaining that section of the highway. *Would there be any way of determining accurately the number of men or the payroll attributable to them while engaged in that maintenance work?*

A. *No, there wouldn't.*

Q. And have you given consideration to an estimate of that figure for the period covered by the policy?

A. Yes, I have.

Q. What is that figure?

A. In dollars it amounts to twenty-two thousand, five hundred and ninety-four.

Q. And are those estimates in your judgment a fair estimate of the total of the amount of money expended in payroll for those two—or for that work?

A. Yes, that does not include the Dusen-berg nor Weldon. (65)

Q. The maintenance figure you gave. It excludes those?

A. It excludes those, yes.

Mr. Peterson: I understand, Mr. Sager, the computation—did you state that it was furnished you by the Attorney General's office, the computation? I just wanted to show the source, is all.

Mr. Sager: It came to me from the Attorney General's office, but it was computed in the office of the Public Roads Administration.

The Court: Well, now are these figures of \$35,000 for Valdez and \$25,594 for work on Section 3,—maintenance section? You say exclusive of the employees of the two contractors who had the sub-contract on Sections 1 and 2?

The Witness: Yes, sir.

If this uncontradicted testimony of an intelligent witness in a better position to know than any one else, did not establish, beyond range of contro-

versy, the fact, that the necessary payroll information was not, and could not be made available to Underwriters, then we confess a lamentable misunderstanding of the value and weight of evidence.

Why disregard the testimony of Mr. Polk for whose testimony appellee vouches? He was the government's engineer in charge of the work and probably in a better position to give the facts than any other person.

The contract provided that appellee would keep "such records as are necessary for the computation of earned premium." In default of which the 50% alternative would become operative.

Why talk about the burden being on appellant to show the amount when appellee itself says "there would be no way of showing the actual payroll." Could appellant be reasonably expected to "establish" anything different?

The Court continues:

"There is an even more apparent defect in appellant's present argument. Invocation of the 50% of total contract cost provision as to \$654,-075.25 of total wages paid, as appellant would have it, would necessarily encompass in the premium base remuneration for work not done in connection with Sections A-1 and A-2. This we have already held cannot be done because of the specifically restricted coverage of the policy. Appellant's formula for computation arrives at a premium base which is equally as improper

as the base which we have heretofore explained and held must be condemned.”

The opinion of this court on the first appeal was based on the facts as then understood. The subsequent hearing clearly showed an entirely different situation calling for a different understanding entitling appellant to relief and anything said in the first opinion should not operate to defeat such right.

The work excluded from the premium base was done under the principal contract between Lytle-Green and the Government, which was extended to include Sections other than A-1 and A-2.

The very purpose of the provisions of the insurance contract was to provide against just such contingencies, which it was foreseen might arise.

To reach the result arrived at, it seems to us that this Court could take no other course than to ignore the plain terms of the contracts made by the parties and the testimony of appellee's witness Polk, whose testimony seems to have been accepted 100% by this court on every other phase of the case.

## THE QUESTION OF INTEREST

- (2) The Court erred in failing to apply long established correct principles of law with respect to *res judicata* on the question of interest.

Original judgment entered September 2nd, 1944, providing for interest from Sept. 2nd, 1942 (Tr. 29).

In their opening brief (P. 6. first appeal) Counsel for appellants say:

“The defendants contended that the million odd dollars of alleged payroll upon which the premium was claimed was not the payroll of employees of the contractors but was the payroll of government employees. They further contended that if the workmen be considered employees of the contractors, that the payroll upon which the premium was claimed was far in excess of the payroll attributable to premium since only two of the contractors actually worked upon the section of the Alaska Highway designated in the policy during the period of coverage, and that the only payroll upon which premium should have been determined was the payroll of these two contractors, amounting to \$90,053.81.”

This Court followed the trial court in holding that the workmen were employees of the contractors, and continued:

\* \* \*

“This change of plans, added to the blocking off of the A-1 and A-2 sections by military deployment, caused the principal personnel resources of appellants, as was testified by the government field engineer, to be ‘diverted to this other job’ of construction on the A-4 highway section farther north and inland toward Fairbanks. Only two of the fourteen associated unit contractors, with a total payroll of \$90,053.81, of the total payroll of \$1,055,214.02 on which the district court based the policy prem-

ium, worked on the A-1 and A-2 sections during the coverage period.

\* \* \*

“Thus work done outside the specified sections of road was therefore not within the policy, and the general payrolls covering work done elsewhere cannot properly be used as a part of the premium base.”

\* \* \*

“The judgment of the district court awarding the full premium claimed must be reversed. An issue appears to be presented as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues as may be necessary for the entry of a judgment for premiums due in conformity with the views herein expressed as to the policy's coverage limitation.” (151 Fed. 2nd. 576)

Let's pause for a moment to analyze the quoted language for the purpose of determining its legal effect: Would any man, lawyer, or layman construe it as reversing the judgment of the lower Court allowing premium on the \$90,053.81 for “payroll on the A-1 and A-2 sections during the coverage period”?

If it were not intended to allow the recovery of premium on \$90,053.81 in accordance with the judgment of the trial Court to stand, why use the lan-

guage, "The judgment of the District Court awarding the *full premium claimed* must be reversed"?

The decision with respect to this item even disregards this Court's own rule 26 as follows:

### Interest

"1. In actions at law where an appeal is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State or Territory where such judgment was rendered."

### RES JUDICATA

---

On this subject this Court said:

"The authorities cited by appellant to the effect that whatever has been decided on one appeal is *res adjudicata* on a subsequent appeal in the same suit, unquestionably state the law. However, the conclusive answer to appellant's contention is that on the prior appeal in this case, the matter of interest was not raised by the parties and was not considered, discussed or decided by this court. Appellant's attempt to ascribe some significance regarding interest to the implied approval in our earlier opinion of the \$90,053.81 amount as part of the premium base, is without merit."

This Court's conclusion that "the conclusive answer to appellant's contention is that on the prior appeal in this case the matter of interest was not

raised," etc., is but a half-statement of the rule well illustrated by the following:

"The phase of the doctrine of *res judicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, *but also to other matters which could properly have been determined in the prior action.* This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."  
30 Am. Jurisprudence, pp 923-4.

"Where a second action is on the same cause of action and between the same parties as a first action, the judgment in the former action is conclusive in the latter as to every question which was or might have been presented and determined in the former.—*Baltimore S. S. Co. v. Phillips*, 47 S. Ct. 600, 274 U. S. 316, 71 L. Ed. 1069."

"*Res judicata* may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also as respects any other available matter which might have been presented to that end.—*Chicot County Drainage Dist. v. Baxter State Bank*, 60 S. Ct. 317, 308 U. S. 371, 84 L. Ed. 329, reversing 103 F. 2d 847."

"An estoppel by judgment extends not only to every matter which was offered or received to sustain or defeat the claim or demand, but



any other admissible matter which might have been offered for that purpose.—*Bates v. Bodie*, 38 S. Ct. 182, 245 U.S. 520, 62 L. Ed. 444.”

“Where the parties and cause of action were the same as in a prior suit, and every objection urged in the subsequent suit was open, within the legitimate scope of the pleadings in the first suit, and might have been presented at that trial, the matter would be considered as having passed in *rem judicatam*, and the former judgment would be deemed conclusive between the parties.—*Gould v. Evansville & C. R. Co.*, 91 U.S. 526, 23 L. Ed. 416.”

“It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel.”

*Outram v. Morewood* 3 East, 346, quoted by Field J. in *Cromwell v. Sac. County* 94 U.S. 351; 24 L. Ed. (Op. 1991).

“If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided.

If the second action was upon a different claim or demand, then the judgment is an estoppel “only as to those matters in issue or points controverted, upon which the finding or verdict was rendered.”

*Bates v. Bodie* (supra)

*Cromwell v. Sac. County* 94 U.S. 351; 24 L. Ed. 195-198

In our case the item of interest was in issue, controverted and judgment rendered.

In *Town of Beloit v. Morgan*, 74 U.S. 619, 19 L. Ed. 205, the Supreme Court said:

“On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical, and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, but as to all further litigation between same parties touching the same subject matter, though the *res* itself may be different.

“An apt illustration of this principle is found in *Gardner v. Buckbee*, 3 Cow., 120. Gardner bought a vessel from Buckbee, and gave two notes for the purchase money. Buckbee sued him upon one of the notes in the Marine Court. Gardner set up as a defense, fraud in the sale and a want of consideration. A verdict and judgment were rendered in his favor. In a suit upon the other note, in the Common Pleas of the City of New York, the judgment in the Marine Court was held to be an estoppel upon the subject of fraud in the sale. *Bouchard v. Dias*, 3 Den., 238; *Doty v. Brown*, 4 N. Y., 71, and *Babcock v. Camp*, 12 Ohio St. 11, are to the same

effect and equally cogent. Such has been the rule of the common law from an early period of its history down to the present time. *Ferrar's case*, 6 Co., 8; *Hitchen v. Campbell*, 2 W. Bl. 831; *Duchess of Kingston's case*, 2 Sm. L. Cases, 656; *Aurora v. West* (ante, 42); see, also *Birckhead v. Brown*, 5 Sandf. S.C., 135. But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

The Supreme Court of the State of Washington in a recent case (Feb. 4th, 1948) *Witte v. Bank*, 129 W. D. 650 (enbanc) said:

"As early as *Sayward v. Thayer*, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137, it was stated:

'The general doctrine is that the plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

"That rule has been steadfastly adhered to and followed in this state." (Citing a large number of cases.)

It is simply begging the question to say that the first decision of this Court *reversed* the judgment of the trial Court as to premium on the \$90,053.81 item.

This action was one to recover certain premiums *with interest* (Complaint Tr. 72).

Stripped of extraneous matters which may tend to confuse, we have this factual situation: On September 22nd, 1944, Hansen & Rowland recovered judgment against Lytle-Green for premium on \$90,053.81, which judgment provided that the amount of recovery bear interest at the rate of six per cent per annum from September 1st, 1942. On appeal to this Court, this judgment of the lower Court was affirmed, the cause was remanded to the trial Court, (not to do anything to disturb or affect the judgment for premium with interest on the \$90,053.81 item), but to take further evidence as to the amount of payroll on travel time, and unloading and moving equipment prior to the diversion of workmen and equipment to Sections other than A-1 and A-2, plus payroll incurred in opening Section A-3 to give access to Sections A-1 and A-2.

We submit that the foregoing is an accurate, fair statement based on the record, to which, in all fairness, this Court should apply the law.

That this Court entirely misconceived the question involved and presented on this phase of the case is clearly apparent from its opinion:

“However, the conclusive answer to appellant’s contention is that on the prior appeal in this case, the matter of interest was not

raised by the parties and was not considered, discussed or decided by this court. Appellant's attempt to ascribe some significance regarding interest to the implied approval in our earlier opinion of the \$90,053.81 amount as part of the premium base, is without merit."

The principle of *res judicata* applies in all its vigor to the original judgment of the trial Court allowing a recovery with interest, a part of which judgment and recovery was affirmed by this Court on the first appeal. Be that as it may, this Court fell into grievous error in assuming, that with respect to its prior opinion, *res judicata* applied only to questions raised and argued, and did not extend to other matters falling within the purview of the original action *which might have been presented and determined*.

Lytle-Green prosecuted the prior appeal and did not question the award of interest from Sept. 1st, 1942, therefore no duty devolved on Hansen & Rowland to mention it.

Whether or not, this Court mentioned interest in its earlier opinion, is unimportant as long as it did not reverse the recovery of premium on the \$90,053.81 item. When that decision became final no Court had a right to disturb it. See cases cited PP 36-37 Appellants Brief.

We endeavored to make this clear in our open-

ing brief, even setting forth the pertinent portion of the judgment of the lower Court (pp. 34-35 App. Brf).

This case has consumed considerable time of this Court and of Counsel, as well. Naturally we hesitate to file this Petition; however, regardless of time and effort, Appellants are entitled to have their rights adjudicated and settled in accordance with long established, long settled general rules and general principles of law.

It seems to us well nigh impossible, for a litigant to make a plainer, clearer case for relief, than has been made here.

We most earnestly and respectfully submit that a rehearing be granted herein.

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